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# Supreme Court of the United States

TERRANCE HAYES, KAISER ALUMINA AND CHEMICAL CORPORATION, AXA GLOBAL RISKS (U.K.), ET AL.,

*Petitioners,*

v.

THOMAS AND BETTS CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

A power outage led to an explosion at an aluminum processing plant in Gramercy, Louisiana, and the Petitioners sustained more than $500 million in damages. The case was tried by a jury, and the trial court, recognizing the numerous errors that occurred at trial, vacated the jury verdict and granted a judgment notwithstanding the verdict and new trial in favor of Petitioners. This JNOV ruling was reversed on appeal, and Petitioners attempted to appeal the jury verdict – the only judgment on the merits in this case. The appellate court initially dismissed the Petitioners' appeal of the jury verdict as premature, until the trial court rendered a new judgment incorporating the jury verdict. After the trial court complied with the order and entered a judgment incorporating the jury verdict, the same appellate court denied Petitioners' appeal, and ruled that such an appeal was barred on the basis of res judicata. The questions presented are as follows:

1. Whether a judgment notwithstanding the verdict which vacates a jury's verdict and is later reversed prevents any appeal of the jury's verdict?

2. Whether Petitioners' right to appeal as guaranteed under Louisiana law and whether Petitioners' due process rights as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution were violated when the

## QUESTIONS PRESENTED – Continued

Louisiana Fifth Circuit Court of Appeal denied Petitioners' appeal of the reinstated jury verdict?

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## CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are identified in the caption of the case. Petitioner Kaiser Aluminum and Chemical Corporation filed for bankruptcy and was dissolved in 2002. Prior to bankruptcy, Maxxim, Inc. was the parent company of Kaiser Aluminum and Chemical Corporation. Certain Underwriters at Lloyd's, London is not a corporation, but an insurance market made up of members. Qatar Insurance Company is a privately held company. The parent corporations to the remaining insurers listed as Petitioners are as follows:

1. AXA Reinsurance S.A. is the parent company of Petitioner AXA Global Risks (U.K.).

2. Allianz Group is the parent company of Petitioner Allianz Insurance Company.

3. Fairfax Financial Holdings Ltd. is the parent company of Petitioner Houston Casualty Company.

4. American International Group, Inc., is the parent company of National Union Fire Insurance Company of Pittsburgh, which is the parent company of Petitioner Lexington Insurance Company.

5. Munich Re Group (Germany) is the parent company of Petitioner Munich Reinsurance Company.

## CORPORATE DISCLOSURE STATEMENT – Continued

6. Q.B.E. Insurance Group Ltd. is the parent company of Petitioner Q.B.E. International Insurance, Ltd.

7. Caisse Centrale des Assurances Mutuielles Agricole (Groupama) is the parent company of Petitioner Sorema Insurance Company.

8. Employers Reinsurance Corp. and Schweizerische Ruckversicherungs-Gesellschaft is the parent company of Petitioner Swiss Reinsurance Company.

9. AXA Group is the parent company of Petitioner Winterthur International Insurance Company.

10. Swiss Reinsurance Company (Zurich) is the parent company of Petitioner Zurich Reinsurance Company.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Terrance Hayes ("Hayes"), Kaiser Alumina and Chemical Corporation, and its property insurers ("Kaiser/AXA") respectfully petition this Court for a writ of certiorari to preserve their constitutional right to appeal by requesting review the judgment of the Louisiana Fifth Circuit Court of Appeal in this case.

## OPINIONS BELOW

The Louisiana Fifth Circuit Court of Appeal's grant of T&B's writ and reversal of Petitioners' motion for a new trial issued on January 30, 2008 was unreported and is attached as Appendix 1, and ruled that res judicata prevents any appeal. The decision of the Louisiana Supreme Court denying writs and dissent by Chief Justice Calogero was unreported and is attached as Appendix 76. The decision of the Louisiana Supreme Court denying rehearing and Chief Justice Calogero's dissent is reported at *In re Gramercy Plant Explosion at Kaiser*, 2008-0481 (La. 06/20/08), 982 So. 2d 763 and is attached as Appendix 78.

## STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1257(c). The Louisiana Fifth Circuit Court of Appeal issued its opinion on January 30,

2008, which reversed the trial court's grant of a new trial and denied Petitioners' right to appeal the reinstated jury verdict, and is reprinted at Appendix 1. The Louisiana Supreme Court denied Petitioners' writ application on May 2, 2008, and denied Petitioners' request for rehearing on June 20, 2008, and are reprinted at Appendices 76 and 78. The final judgment of the trial court is unreported and reprinted at Appendices 7 and 16.

## CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution guarantees citizens due process and equal protection, including a right to appeal where a state guarantees that right by providing a procedure for appellate review. The Louisiana Supreme Court failed to correct the errors of the Louisiana Fifth Circuit Court of Appeal when it erroneously denied Petitioners' writ, which violated Petitioners' right to appeal as guaranteed by Louisiana constitutional, statutory, and case law. The denial of Petitioners' right to appeal conflicts with the Due Process and Equal Protection provisions of the Fifth and Fourteenth Amendments of the United States Constitution, in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

## STATEMENT OF THE CASE

This case began with a massive short circuit and explosion at the Kaiser Gramercy aluminum plant in Louisiana on July 5, 1999. The explosion injured thousands of people, including applicant Terrance Hayes, who was blinded and severely burned by superheated lye solution. The Kaiser Alumina and Chemical Corporation and its property insurers ("Kaiser/AXA") sustained nearly half a billion dollars in losses. The short circuit was caused by a failure of adhesive backed mounts which were designed, manufactured, and sold by the Thomas and Betts Corporation ("T&B"). The T&B mounts failed in normal service and allowed a low voltage instrument line to contact an 8,000 volt bus bar. A short circuit ensued, which in turn caused the power failure at the Kaiser plant and a massive explosion. The Kaiser workers, searching in the dark, were unable to find the source of the power outage in time to avoid the explosion.

The matter was tried to a jury, and the jury failed to assign fault to T&B, despite T&B's admissions during trial that without the electrical outage, no explosion would have occurred. The trial court acknowledged the errors that occurred during trial, vacated the jury verdict and granted judgment notwithstanding the verdict and conditional new trial in favor of Kaiser/AXA and Hayes. The trial court assessed Kaiser/AXA's losses at $335,000,000, Hayes' losses at $20,000,000, and allotted 25% of the fault to T&B, which resulted in a judgment of $88,750,000 plus interest and costs against T&B, for a total judgment of

more than 120 million dollars. T&B appealed, and the Louisiana Fifth Circuit Court of Appeal ("Fifth Circuit") reversed the JNOV and conditional new trial in 2006 and reinstated the jury verdict. After the Fifth Circuit reversed the trial court's JNOV and conditional new trial and reinstated the jury verdict, Kaiser/AXA and Hayes attempted to appeal the reinstated jury verdict, but the Fifth Circuit dismissed their appeal as premature. Subsequently, Petitioners were denied any right to appeal the jury's verdict, which was vacated by the trial court's JNOV. The Louisiana Supreme Court declined review of the Fifth Circuit's decision, but Chief Justice Calogero's dissenting opinion recognized the violation of the Petitioners' right to appeal:

> While the law appears not to be entirely clear on when an appeal on the merits may be taken after a JNOV and new trial are granted, but those rulings are later reversed and the jury verdict reinstated by the court of appeal, I would come down on the side of allowing the appeal at this juncture, if for no other reason than it seems no appellate court has yet examined the merits of the jury verdict. Furthermore, the cases that come close to addressing the issue either tend to support the Petitioners' position or are inconclusive. *Junot v. Morgan*, 01-0237 (La. App. 1 Cir. 2/5/02), 818 So. 2d 152, would favor the case being remanded to the district court to enter a judgment pursuant to the jury verdict and permit further proceedings, including an appeal therefrom. And this court in

*Vasalle v. Wal-Mart Stores, Inc.*, 01-0462 (La. 11/28/01), 801 So. 2d 331, after reversing the JNOV and new trial order, simply reinstated the jury verdict, without any instruction to the district court; therefore, this court in *Vasalle* did not address whether an appeal on the merits might lie from the reinstated jury verdict.[1]

## REASONS FOR GRANTING THE PETITION

Few aspects of American civil procedure are as deeply ingrained as a party's right to appeal. While this Court has long held that there is no "right" to appeal in the Constitution, it has held that where a state provides a process of appellate review, those procedures must comport with the constitutional guarantees of due process and equal protection. *See McKane v. Durston*, 153 U.S. 684 (1894), *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Louisiana guarantees the fundamental right to appellate review through its constitution, statutes, and case law.

Petitioners have been denied their Constitutional right to due process and equal protection through appeal as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. U.S. Const. amend. V, XIV. These amendments guarantee due process by the federal and state

[1] App. 76.

governments, and afford (in pertinent part) that its citizens shall not "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, XIV. This case warrants the extraordinary remedy of appellate review by this court, as the lower courts' judgments have effectively denied the Petitioners' right to appeal an adverse jury verdict as otherwise accorded under Louisiana law, without notice and an opportunity to be heard in a case worth more than a half billion dollars. This is a case of first impression in any American jurisdiction, as Petitioners have located no authority that reversal of a judgment notwithstanding the verdict without a full review of a jury trial record operates as a final judgment that eliminates the right of the Petitioners to subject the merits of the jury verdict to appellate review.

## ARGUMENT

### I. The jury verdict was so defective in this case that the trial court granted a JNOV and a new trial twice. The appellate court, which has never reviewed the jury trial under applicable standards, has denied Petitioners' right to appellate review because it reversed the trial court's JNOV.

The Fifth Circuit's dismissal of Kaiser/AXA's appeal in accordance with the principle of res judicata and the Louisiana Supreme Court's denial of writs on the matter amounts to a denial of Petitioners' due process. The jury verdict, which is the only judgment

on the merits in this case, has never been appealed. The Fifth Circuit has ruled that there will never be an appeal. App. 1. When the trial court granted JNOV, that JNOV vacated the jury verdict, and thus it could not be appealed unless and until the jury verdict was reinstated. When the Fifth Circuit reversed the JNOV and reinstated the jury verdict, Kaiser/AXA filed an appeal of the reinstated jury verdict. App. 79. The Fifth Circuit dismissed this appeal as *premature*, ruling that the trial court had not signed a judgment that incorporated the jury verdict, and thus, there was no judgment to appeal. App. 22. Once the trial court signed a judgment incorporating the jury verdict, Kaiser/AXA and Hayes filed a motion for a new trial, which was granted. App. 7. The Fifth Circuit then reversed its earlier judgment, and stated that the JNOV reversal functioned to make the judgment of the jury acquire the "authority of the thing adjudged" under the principle of res judicata, and indicated that the judgment was "not subject to modification, revision or reversal on the issue of the new trial, or any other issue." App. 1. Kaiser/AXA and Hayes were denied the right to appeal the reinstated jury verdict.

## II. The Louisiana Supreme Court and Fifth Circuit erred when both courts denied Petitioners' leave to appeal the reinstated jury verdict, which was previously vacated by the trial court's judgment notwithstanding the verdict.

### A. Res judicata is not a bar to appellate review of the reinstated jury verdict.

Res judicata is a well-litigated topic that requires a final judgment on the merits as a bar to repeat litigation. La. R.S. § 13:4231 cmt. (d) (2008), *Tolis v. Bd. of Supervisors of Louisiana State Univ.*, 95-1529 (La. 10/16/95), 660 So. 2d 1206, *citing* La. Code Civ. Proc. art. 1841 (2008). There has never been an appeal of any judgment incorporating the jury verdict herein, which is the only judgment on the merits in this case. Nonetheless, the Fifth Circuit concluded that there is no right to appeal. App. 1. In January 2008, the Fifth Circuit ruled that its 2006 judgment that reversed the JNOV and reinstated the jury verdict was a final judgment that decided the merits of the case. *Id., citing Tolis*, 95-1529, 660 So. 2d 1206. In *Tolis*, the Louisiana Supreme Court held that the appellate court's dismissal of the plaintiff's action in its entirety *with prejudice* decided the *merits* of the case, and operated as a final judgment subject to res judicata and was conclusive between the parties. *Id.* In the present case, there has never been a dismissal with prejudice that survived a post-trial motion, which is much different than *Tolis*.

There is no case or statutory authority for the proposition that the Fifth Circuit's reversal of the trial court's JNOV and reinstatement of the jury verdict operates as a final decision on the merits of the jury verdict. A nationwide jurisprudence search reveals no case or statutory authority that a reversal of a JNOV operates as a final decision that decides the merits of a vacated jury verdict and the JNOV reversal eliminates any right of appeal of the jury verdict.

Pursuant to Louisiana law, when the Fifth Circuit reviewed the JNOV, it examined the evidence in the light most favorable to T&B in reaching its conclusion to reverse the JNOV and reinstate the jury verdict. *In re Gramercy*, 04-1151, 927 So. 2d at 498. Upon reviewing the trial court's JNOV, the Fifth Circuit acknowledged that as a reviewing court, it applied the standard of review for JNOV. *Id.* The Fifth Circuit did *not* consider the merits of the case to decide if the jury's verdict was *correct*, but only whether the JNOV was properly granted. *Id.*

The Fifth Circuit most recently cited *Avenue Plaza, L.L.C. v. Falgoust* for several principles underlying the concept and use of res judicata. App. 1, *citing* 96-0173 (La. 7/2/96), 676 So. 2d 1077. *Avenue Plaza* is distinguishable from the present case because it involved two separate lawsuits: one that was complete, followed by a separate case that was filed, regarding the legal effect of an unrecorded lease between two parties. *Id.* at 1079. The principles articulated in *Avenue Plaza* and res judicata are

inapplicable to this case. The reversal of the trial court's grant of the JNOV, while final as to the JNOV, is not a judgment on an appeal of the jury verdict, which has never been appealed. The merits of the jury's verdict have never been the subject of an appeal or a final judgment. Thus, the Fifth Circuit should not bar Petitioners from appealing the only judgment on the merits in this case – the judgment incorporating the jury's verdict, which was previously vacated by the JNOV. Vacated judgments are not appealable.

Claim preclusion and issue preclusion operate only on final judgments to bar relitigation of claims that could have been raised in a prior proceeding, and issues that were raised in a prior proceeding. *See Terrebonne Fuel & Lube v. Placid Ref. Co.*, 95-0654, (La. 01/16/96), 666 So. 2d 624, 632. An application of issue preclusion presupposes that the substance of the issue precluded was addressed in prior litigation and embodied in a final judgment on the merits, while an application of claim preclusion bars a second action if it arises out of the same occurrence which was the substance matter of the prior litigation. *Terrebonne*, 95-0654, 666 So. 2d at 634. The Louisiana Supreme Court has held that the doctrine of res judicata is triggered only by final judgments on the merits. *Tolis*, 95-1529, 660 So. 2d 1206, *citing* La. Code Civ. Proc. art. 1841. Neither of these doctrines apply at this time to this litigation, as the only judgment on the merits in this case – the jury's verdict – has never been subject to appellate review.

### B. The Fifth Circuit first dismissed Petitioners' appeal of the reinstated jury verdict as premature, and then erroneously denied the appeal on the basis of res judicata.

Inexplicably, the Fifth Circuit's most recent opinion that denies Petitioners' appellate rights omits and does not cite its significant prior ruling that it rendered on January 16, 2007, which deemed Petitioners appeal *premature* for failure of the trial court to enter a new judgment incorporating the jury verdict. App. 22. The Louisiana Supreme Court denied Petitioners' writ application regarding the Fifth Circuit's reversal of the trial court's JNOV on June 14, 2006, which the Fifth Circuit correctly identified as a final judgment – as to the JNOV. App. 74. Kaiser/AXA filed a motion for a devolutive appeal on August 9, 2006, within the 60-day time limit accorded to devolutive appeals under La. Code Civ. Proc. art. 2087 (2008). App. 79. T&B filed a motion to dismiss this appeal and argued that the appeal was barred by res judicata, pursuant to the judgment rendered by the Fifth Circuit that reversed the trial court's JNOV on March 28, 2006. App. 25. The Fifth Circuit granted T&B's motion to dismiss the appeal, but on different grounds. App. 22. The Fifth Circuit dismissed the appeal as premature, and held that the trial court had not yet entered an order adopting the jury verdict after the Fifth Circuit's reversal of its JNOV. App. 22. The Fifth Circuit held that there was no final judgment for Kaiser/AXA to appeal, and thus the Fifth

Circuit was without jurisdiction to lodge Kaiser/AXA's appeal. App. 22. The Fifth Circuit noted that this could be remedied by motioning the trial court to enter a final judgment on the jury verdict. App 22. The Louisiana Supreme Court then denied T&B's writ which requested a ruling that the case was concluded and that no additional trial or appellate jurisdiction existed. App. 20.

Kaiser/AXA heeded the Fifth Circuit's instruction to obtain a final judgment from the trial court that incorporated the jury's verdict. On September 4, 2007, after holding a hearing and consulting with all parties about the final form of judgment, the trial court signed a final judgment incorporating the jury verdict, the form of judgment presented to the trial court by T&B. App. 16. In accordance with the rules governing post trial motions, Kaiser/AXA and Hayes filed motions for a new trial and a change of venue. The trial court granted the motion for a new trial on discretionary grounds, due to the errors and irregularities that occurred at trial. App. 7.

T&B filed an application for supervisory writs to the Fifth Circuit, which reversed the trial court's grant of a new trial. App. 1. However, the language in the Fifth Circuit's opinion indicates that the Fifth Circuit not only reversed the grant of a new trial, but also intended to foreclose Petitioners' right to appeal the jury verdict. App. 1. In the Fifth Circuit's opinion, it states that it did not remand the case after reversing the JNOV "for the trial judge to render and sign judgment on the jury verdict, allowing further

proceedings *or appeals* as provided by law." App. 1 (emphasis added), *citing Cf. Junot v. Morgan*, 01-237 (La. App. 1 Cir. 2/20/08), 818 So. 2d 152. Instead, the Fifth Circuit ruled that as of June 14, 2006, the jury's verdict "acquired the authority of the thing adjudged and was not subject to modification, revision, or *reversal* on this issue, or *any other issue*." App. 1 (emphasis added).

As the Fifth Circuit clearly intended to foreclose all future litigation in this matter under the principles of res judicata, including any appeal of the jury's reinstated verdict, it committed an egregious error. Res judicata is only triggered by *final judgments on the merits*. La. R.S. § 13:4231 cmt. (d) (2008), *Tolis*, 95-1529, 660 So. 2d 1206, *citing* La. Code Civ. Proc. art. 1841 (2008). The merits of the jury's verdict have never been addressed by the Fifth Circuit. T&B's appeal of the JNOV was not a consideration of the merits of the jury verdict, which were not available for review, as it had been vacated by the JNOV. *Junot v. Morgan*, 2002-0237, 818 So. 2d at 156-57.

### C. Vacated jury verdicts are not appealable until reinstated by the trial court.

In *Junot*, the defendant tried to suspensively appeal both the JNOV and the vacated jury verdict at the same time. *Junot*, 2002-0237, 818 So. 2d at 156. The First Circuit ruled that an appealing party could not seek review of both a jury's verdict and a JNOV rendered under Louisiana Code of Civil Procedure

article 1811(E), because the JNOV *replaced* the jury's verdict. *Junot*, 2002-0237, 818 So. 2d at 156-57. Thus, the First Circuit dismissed the defendant's appeal of the jury's verdict as premature, because the judgment was "set aside" by the JNOV verdict. *Id.* The First Circuit ruled that prematurely considering an appeal of a judgment of a set aside verdict at the same time it reviews a JNOV will have "the potential effect of terminating the *post-judgment rights* of the parties, *for example*, the right to a new trial ruling in the trial court under *La. C.C.P. art. 1811E.*" *Id.* (emphasis added). The crux of *Junot* is that when a JNOV is granted, the jury's verdict is set aside. *Id.* Therefore, it follows that a party cannot appeal both a jury verdict and a JNOV because the JNOV effectively vacates the jury verdict. A party cannot appeal a vacated judgment. The opportunity to appeal the jury verdict did not arise until the Fifth Circuit had reinstated the jury verdict after it reversed the JNOV and when the Louisiana Supreme Court denied writs as to the Fifth Circuit's reversal of the JNOV. Kaiser/AXA attempted to appeal the jury verdict after this occurred, and the Fifth Circuit dismissed the appeal as premature, and noted that there was no judgment from the trial court that incorporated the jury verdict. App. 22. Once the trial court signed the judgment that incorporated the jury verdict, Petitioners had the statutory right to file

post-trial motions on that judgment.[2] App. 16. Only after the post-trial motions were disposed of could Petitioners appeal the jury verdict. The ramifications of the Fifth Circuit's most recent application of res judicata which holds that the reversal of the JNOV is a final judgment triggering res judicata results in ridiculous outcomes. This trial was so fraught with error that the trial judge granted a JNOV and two new trials. Once confronted with the appeal of the jury's verdict, the appellate court simply disallowed any appellate review of the only judgment on the merits in this matter (jury's verdict), simply because the Petitioners won a JNOV that was later reversed.

Chief Justice Calogero dissented from the Louisiana Supreme Court's majority decision that denied review of the Fifth Circuit's opinion. App. 76. He wrote separately to caution the majority that the Louisiana Supreme Court and Fifth Circuit effectively violated the Petitioners' right to appeal an adverse jury verdict, and noted that no appellate court had yet examined the merits of the jury verdict. App. 76. He opined that he would grant writ in this matter "to permit further proceedings, including an appeal therefrom." App. 76. Justice Calogero also reasoned that the Louisiana Supreme Court had not addressed whether an appeal from the merits would lie from a reinstated jury verdict, and noted that the

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[2] No specific provisions in Louisiana law prohibit a trial court from granting a second new trial. *Carlone v. Carlone*, 444 So. 2d 1274, 1276 (La. App. 4 Cir. 1984).

cases that came close to addressing the issue either tended to support Kaiser/AXA's position or were inconclusive, which provided sufficient grounds to grant writ. App. 76.

The Fifth Circuit chose to ignore precedential law from its sister circuit, the Louisiana Supreme Court declined the opportunity to resolve the split in circuits, and the ensuing decision denied Petitioners' right to appeal. Other states follow the rule of *Junot* that a jury verdict is procedurally held in abeyance upon grant of a JNOV, making any appeals of the jury verdict premature unless and until the jury verdict is reinstated. The Fifth Circuit has not yet considered the merits of this case, and its latest decision refuses to consider Kaiser/AXA's appeal, which is guaranteed under Louisiana law.

## III. Other jurisdictions embrace similar rules regarding JNOVs and vacated jury verdicts as enunciated by the Louisiana First Circuit Court of Appeal in *Junot v. Morgan*.

### A. California: *Lippert v. Avco Community Developers, Inc.*

California also follows a rule similar to *Junot*. In *Lippert v. Avco Community Developers, Inc.*, the court held that when a JNOV is reversed on appeal, the reinstated judgment on the verdict is a new judgment for the purposes of appeal. 60 Cal. App. 3d 775, 779 (Cal. Ct. App. 1976). In *Lippert*, the jury returned a

verdict against the defendants, and the trial court granted the defendants' motions for JNOV and new trial. *Lippert*, 60 Cal. App. at 777. Plaintiffs appealed, and the appellate court reversed the JNOV and new trial, and reinstated the jury verdict. *Id.* Defendants filed a notice of appeal on the jury verdict, and plaintiffs filed a motion to dismiss, contending that the appellate court lacked jurisdiction to hear the appeal. *Id.* The plaintiffs argued that the defendants' appeal was untimely, and that the defendants should have filed a cross-appeal at the time that the plaintiffs appealed the JNOV and new trial. *Lippert*, 60 Cal. App. at 778.

The appellate court noted that rather than appealing the jury verdict at the time it was rendered, the defendants chose to pursue relief in the trial court by filing post-trial motions for JNOV and new trial. *Id.* at 777. The appellate court noted that the defendants' actions of filing these post-trial motions were not only understandable, but commendable because compared to an appeal, post-trial court remedies are quicker and involve less time and money to file. *Id.* The appellate court noted that if the JNOV and new trial were denied, the defendants would have been able to file a timely notice of appeal. *Id.* Because the trial court granted the JNOV, defendants *could not* have taken the precautionary cross-appeal as urged by the plaintiffs, *because the jury verdict was vacated by the JNOV, and no appeal lies from a vacated judgment. Lippert*, 60 Cal. App. at 777-78 (emphasis added), *citing Lantz v. Vai*, 199 Cal. 190, 190 [248 P. 665] (Cal. 1926); *Ferraro v. Pacific Fin. Corp.*, 8 Cal. App. 3d 339, 345 [87 Cal. Rptr. 226]

(Cal. Ct. App. 1970); *Hozz v. Felder*, 167 Cal. App. 2d 197, 201 [334 P.2d 1590] (Cal. Ct. App. 1959).

The appellate court's review of California rules did not yield an explicit provision that mandated that a party must cross-appeal at the same time a JNOV is appealed. *Lippert*, 60 Cal. App. at 778. The court further held:

> [W]e can conceive of no justification for allowing a cross-appeal where both judgment notwithstanding the verdict and, in the alternative, new trial have been granted, but denying it where the judgment notwithstanding the verdict has been granted but a new trial has been denied. *This would surely be a case of the tail wagging the dog.*

*Id.* (emphasis added). The appellate court also held that until the JNOV was reversed, "nunc pro tunc reinstatement of the judgment on the verdict would result in a complete denial of defendant's right to appeal from that judgment." *Id.* at 779. The *Lippert* court concluded that the right of appeal is favored by the courts and appellate rules are to be construed to preserve that right. *Lippert*, 60 Cal. App. at 779.

Petitioners have suffered the same denial of their right to appeal herein as the defendants in *Lippert*. Instead of appealing the jury verdict when it was originally rendered, Petitioners chose to pursue post-trial relief by filing motions for a JNOV and new trial. Like the *Lippert* defendants, Petitioners could not file a cross-appeal of the jury verdict at the time that T&B appealed the JNOV, as the JNOV vacated

the jury verdict. If the trial court had originally denied the JNOV, Petitioners would have been allowed to appeal the jury verdict. Why should a JNOV that is won and later reversed on appeal and the reinstated jury verdict be any different?

### B. Michigan: *Cox v. Board of Hospital Managers for the City of Flint*

The Michigan Supreme Court addressed this issue in *Cox v. Bd. of Hosp. Managers for the City of Flint*, 651 N.W.2d 356 (Mich. 2002). In *Cox*, the jury awarded the plaintiff $2.4 million for the damages he suffered as a result of the defendant's medical malpractice. *Id.* at 359. Defendant moved for a JNOV, new trial, or remittitur. *Id.* The trial court ruled that it would grant the defendant's motion for a new trial unless the plaintiff accepted a remittitur of $750,000. *Id.* The plaintiff appealed. *Id.*

The appellate court ordered the trial court to provide a detailed opinion as to the basis of its remittitur. *Cox*, 651 N.W.2d at 359. The trial court then reversed its prior grant of remittitur and granted the defendant's motion for JNOV. *Id.* The plaintiff again appealed. *Id.*

The appellate court reversed the JNOV and reinstated the jury verdict, and held that there was sufficient evidence of negligence to support the jury verdict. *Cox*, 651 N.W.2d at 359. The defendant then filed a cross-appeal of the jury verdict, and the appellate court dismissed defendant's appeal, noting that

the defendant had not submitted a copy of the trial court's order. *Cox*, 651 N.W.2d at 359. The trial court then vacated its order granting defendant's JNOV and reinstated the jury verdict. *Id.*

The defendant then appealed, and the appellate court dismissed the defendant's appeal, and held that the defendant's appellate issues were not preserved because it failed to file a cross-appeal from the original trial court order. *Cox*, 651 N.W.2d at 359. The dissent noted that the majority failed to understand that after the trial court granted the JNOV, the JNOV vacated the jury verdict, and could not be appealed as of right. *Id.*

> Simply put, there was no right (or requirement) to appeal (or cross appeal) the 1994 judgment during the period that it was vacated by the grant of new trial, remittitur, and JNOV. As such, defendant was not required or permitted to appeal as of right the 1994 judgment until after this Court's decision in *Cox* and after the trial court's order reinstating the judgment.

*Cox v. Bd. of Hosp. Managers for the City of Flint*, 620 N.W.2d 859, 876 (Mich. Ct. App. 2000), *citing* unpublished opinion per curiam, issued April 6, 1999 (Docket No. 205025).

The defendant then appealed to the Michigan Supreme Court, which vacated the appellate court's dismissal of the defendant's appeal. *Cox*, 651 N.W.2d at 359-60, *citing Cox*, 613 N.W.2d 719 (Mich. 2000).

On remand, the appellate court affirmed its dismissal, and one judge dissented. *Id.*, *citing Cox,* 620 N.W.2d 859 (Mich. 2000). The Michigan Supreme Court initially denied defendant's application for leave to appeal, then granted it upon defendant's motion for reconsideration, thus granting the defendant the right to appeal which had been denied by the appellate court. *Id.*, *citing Cox,* 639 N.W.2d 805 (Mich. 2002).

The procedural posture of *Cox* is similar to the present case. As in *Cox*, the trial court granted a JNOV, which effectively vacated the jury verdict. *Cox*, 651 N.W.2d at 359. The appellate court denied defendant the right to appeal the jury verdict, which was reversed by the Michigan Supreme Court. *Id.* at 360. Thus, the Michigan Supreme Court agreed with the appellate court dissent, which held that the defendant was not obligated to file a cross-appeal at the time the JNOV vacated the jury verdict. *Cox*, 651 N.W.2d at 360.

## IV. Denial of Kaiser/AXA's right to appeal the reinstated jury verdict amounts to a denial of due process and equal protection.

"Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985), *quoting Bd. of Regents v. Roth*, 408

U.S. 564, 577 (1972). For the purposes of due process, "liberty" and "property" have a descriptive definition based on state law, and a normative definition based on federal law. L. Tribe, *American Constitutional Law*, § 10-5 (1978). The basic foundations of procedural due process, the right to notice and the opportunity to be heard in a reasonable time and manner, have achieved constitutional dimension. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). However, other elements of procedure, such as the right to appeal, are "made up of values that are not elements of ordered liberty in the due process sense, but nevertheless are basic and traditional." Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, Mich. L. Rev. 797, 802-03 (1971). Appellate review is now an integral part of proper adjudication of claims. "The right to appeal, while never held to be within the Due Process guaranty of the United States, is a fundamental element of procedural fairness as generally understood in this country." ABA Comm'n on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.10 commentary at 14 (1977).

A civil plaintiff's victory deprives a defendant of liberty or property, and a civil defendant's victory deprives a plaintiff of the plaintiff's property right in its claim. John Leubsdorf, *Article: Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 587 (1984). This Court has held that a cause of action is a type of property right that is protected by the Due Process Clause of the Fourteenth Amendment. *Logan v.*

*Zimmerman Brush Co.*, 455 U.S. 422, 428, n.4 (1982), *citing Martinez v. California*, 444 U.S. 277, 281-82 (1980). The Due Process Clause provides that substantive rights such as life, liberty, and property cannot be divested unless pursuant to constitutionally adequate procedures. *Loudermill*, 470 U.S. at 539.

> The categories of substantive and procedure are distinct . . . "[p]roperty" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

*Loudermill*, 470 U.S. at 540, *citing Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part), *see id.* at 185 (White, J., concurring in part and dissenting in part). "[The] adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Vitek v. Jones*, 445 U.S. 480, 490-91, n.6 (1980), *quoting Arnett*, 416 U.S. at 167. Once a court determines that the Due Process Clause applies, "the question remains what process is due." *Loudermill*, 470 U.S. at 540, *citing Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

This Court has upheld due process requirements for state-created rights not found in the federal constitution. In *Goss v. Lopez*, this Court ruled that while the federal constitution did not provide a fundamental right to education, when the state of Ohio chose to provide the right to public education, Ohio was bound by the comports of due process to provide students with a hearing before suspending them. 419 U.S. 56 (1975). "Having chosen to extend the right of education, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574.

## CONCLUSION

The Louisiana Constitution guarantees the right of appeal, and Louisiana courts favor the right of appeal. *Succession of Damico*, 109 So. 402 (La. 1925), *citing* La. Const. art. VII §§ 29, 48 (1921), *Succession of Tullier*, 216 La. 821, 824 (La. 1950), *citing State ex rel. Durand v. Parish Judge*, 30 La. Ann. 282 (La. 1878), *First Nat'l Bank of Ruston v. Lagrone*, 164 La. 907, 114 So. 832 (La. 1927), *Pool v. Gaudin*, 207 La. 403, 21 So. 2d 424 (La. 1945). Once a final judgment is rendered in a case in which appeal is allowed by law, that party is entitled to an appeal as a matter of right. *Id.*, *see also Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 176 So. 2d 425,

432 (La. 1965), *Taylor v. Taylor Builders, Inc. v. Moore*, 393 So. 2d 792, 793 (La. App. 1 Cir. 1981), *Burton v. Hinton*, 426 So. 2d 192, 193 (La. App. 1 Cir. 1982). The appeal of a final judgment is not a matter of grace, but a matter of right, and as it is favored by Louisiana law, the right to appeal should be maintained whenever possible. *Id.*

Louisiana provides a process of appellate review in the Louisiana Code of Civil Procedure. La. Code Civ. Proc. Ann. art. 2082 (2008). "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Griffin*, 351 U.S. at 38-39 (Harlan, J., dissenting). Due process concerns are implicated when a state implements a system of appeals as of right but refuses to offer each defendant a fair opportunity to obtain adjudication of the merits of his appeal. *Evitts v. Lucy*, 469 U.S. 387, 405 (1985) (Rehnquist, J., dissenting). "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." *Evitts*, 469 U.S. at 400-01. Because Petitioners have the right to appeal the reinstated jury verdict that was previously vacated by the trial court's JNOV, Petitioners' appeal and the trial court's judgment

of September 4, 2007 should be reinstated for further proceedings in accordance with law.

Respectfully submitted,

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App. 1

**Application For Writs**

No. '07-C-893

**COURT OF APPEAL, FIFTH CIRCUIT**

**STATE OF LOUISIANA**

NOV - 8 2007

/s/ Mary P. Legnon
Deputy Clerk

**IN RE GRAMERCY PLANT EXPLOSION AT KAISER**

IN RE THOMAS & BETTS CORP.

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**APPLYING FOR** SUPERVISORY WRIT FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ST. JAMES, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE PEGRAM J. MIRE JR., DIVISION "D", NUMBER 25975

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***WRIT GRANTED;***
***JUDGMENT REVERSED;***
***MOTIONS DENIED***

***Gretna, Louisiana this 30th day of January, 2008.***

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**WRIT GRANTED; JUDGMENT REVERSED; MOTIONS DENIED**

On March 28, 2006, this Court, by published opinion, reversed the trial court judgment granting respondents' Motions for Judgment Notwithstanding the Verdict ("JNOV") and conditional grant of their Motions for New Trial. Importantly, this Court *rendered* judgment by reinstating the jury verdict.[1] *In re Gramercy Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 3/28/06), 927 So.2d 492, 501-502, *writ denied*, 06-1003 (La. 6/14/06), 929 So.2d 1271. One year later, respondents petitioned the trial judge for a new trial and change of venue. On October 10, 2007, the trial judge granted respondents' motion for new trial on discretionary grounds, including the trial judge's admission that he himself had committed numerous errors during trial. Relator, Thomas and Betts, seeks supervisory review of the trial court's grant of a new trial, on the basis that the judgment rendered by this Court is now final. *Id.*

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[1] We did not remand for the trial judge "to render and sign judgment on the jury verdict, allowing for all further proceedings or appeals as provided by law." *Cf. Junot v. Morgan*, 01-237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152.

A judgment that decides the merits of the case in whole or in part is a final judgment. La. C.C.P. art. 1841; *Tolis v. Board of Supervisors of Louisiana State University*, 95-1529 (La. 10/16/95), 660 So.2d 1206. A final judgment is conclusive between the parties except on direct review. La. R.S. 13:4231; *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173 (La. 7/2/96), 676 So.2d 1077, 1079.

Moreover, a judgment becomes final and definitive and acquires the authority of the thing adjudged if no further review is sought within the time fixed by law, if the Supreme Court denies an application for certiorari, or if the judgment is confirmed on further review. La. C.C.P. arts. 2166(A); La. C.C.P. art. 2166(E); *Avenue Plaza, L.L.C.*, 676 So.2d at 1079; *Tolis*, 660 So.2d at 1206. Once a final judgment becomes final and definitive and acquires the authority of the thing adjudged, no court has jurisdiction, in the sense of power and authority, to modify, revise or reverse the judgment, regardless of the magnitude of the error in the final judgment. *Avenue Plaza, L.L.C.*, 676 So.2d at 1079; *Tolis*, 660 So.2d at 1206.

Our March 28, 2006 judgment reversed the JNOV, reinstated the jury verdict, and reversed the conditional grant of a new trial on discretionary grounds. Respondent Hayes did not apply for rehearing to this Court or for writs of certiorari to the Louisiana Supreme Court. Thus, with respect to respondent Hayes, our judgment, which reinstated the jury verdict, became final and definitive and acquired the authority of the thing adjudged on April

27, 2006, since no further review was sought within the time fixed by law.[2]

Respondents-Kaiser and AXA Global applied for writs of certiorari to the Louisiana Supreme Court. On June 14, 2006, the Supreme Court denied writs. *In re Gramercy Plant Explosion at Kaiser*, 06-1003 (La. 6/14/06), 929 So.2d 1271. Thus, with respect to respondents Kaiser and AXA Global, our judgment, which reinstated the jury verdict, became final and definitive and acquired the authority of the thing adjudged on June 14, 2006, when the Louisiana Supreme Court denied writs. La. C.C.P. art. 2166(E). Thus, as of June 14, 2006, the judgment of the jury acquired the authority of a thing adjudged and was not subject to modification, revision or reversal on this issue, or any other issue.

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[2] La. C.C.P. art. 2166(A) reads, "Within fourteen days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the court of appeal for a rehearing. Within thirty days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the supreme court for a writ of certiorari. The judgment of a court of appeal becomes final and definitive if neither an application to the court of appeal for rehearing nor an application to the supreme court for a writ of certiorari is timely filed." *See also*, La. R.S. 13:4446(E), which states, "Judgments of all appellate courts become final and executory upon the expiration of the delay for applying for rehearing if no application therefor has been filed timely."

On this basis, we hereby grant Thomas and Betts' writ application, reverse the trial court's judgment granting respondents' a new trial, and deny respondents' motions for new trial.

Gretna, Louisiana, this 30th day of January, 2008.

/s/ SMC
**JUDGE SUSAN M. CHEHARDY**

/s/ MFE
**JUDGE MARION F. EDWARDS**

/s/ GGG
**JUDGE GREG G. GUIDRY**

| | |
|---|---|
| **IN RE GRAMERCY PLANT EXPLOSION AT KAISER** | **23rd JUDICIAL DISTRICT COURT** |
| **MASTER DOCKET NO. 25,975 DIV. "D"** | **PARISH OF ST. JAMES STATE OF LOUISIANA** |
| **FILED: Oct. 12, 2007** | /s/ J. Donaldsen **DEPUTY CLERK OF COURT** |

## REASONS FOR JUDGMENT

**THIS MATTER** was heard on September 12, 2007, in Convent, Louisiana on a Motion for a New Trial.

On July 5, 1999, a major power outage and explosion occurred at Kaiser's facility in Gramercy, causing many people to be seriously injured and causing extensive property damages. The only parties currently remaining in this litigation are defendant Thomas & Betts Corporation and plaintiffs Terrance Hayes, who suffered permanent vision impairment from his injuries suffered on July 5, 1999, and Kaiser and its property reinsurers, AXA, et al, who suffered significant property and business interruption damages.

Trial was held from October 15, 2001 through November 19, 2001 in the St. James Parish courthouse on the issue of the liability of Thomas & Betts Corporation and others to over 20,000 claimants, and the issues of damages to Hayes, Kaiser and AXA.

The jury ultimately held in favor of plaintiffs, and against some defendants, PCS and Excel/MEI, and assigned damages to Hayes, but did not assign damages to Kaiser or AXA. The jury assigned no responsibility to T&B, despite evidence that T&B's product failed to comply with Louisiana's product liability law.

Following the jury verdict and entry of judgment in accordance with the jury verdict, Hayes, Kaiser, the certified class, and others filed motions for judgment notwithstanding the verdict and a new trial, which were granted by this Court. Thomas & Betts appealed and then settled with all remaining claimants except Kaiser and Hayes. After Thomas and Betts settled with all other plaintiff groups, the Fifth Circuit Court of Appeal reversed this Court's judgment notwithstanding the verdict and order for a new trial. The Supreme Court denied writs.

Kaiser/AXA, attempted to appeal the jury's verdict after the JNOV and new trial was reversed. T&B filed a motion to dismiss Kaiser/AXA's appeal. The Fifth Circuit granted T&B's motion to dismiss the appeal because there was no judgment adopting the jury verdict. The pre-JNOV judgment had been vacated when the JNOV was granted. No one had moved this Court to sign a new judgment adopting the jury verdict after the Fifth Circuit reversed the JNOV. The Fifth Circuit Court of Appeals concluded that there was no final judgment for Kaiser/AXA to appeal and recommended that the defendant could move this Court for a judgment in accordance with

the jury verdict, so that the matter could be out back on track. The Louisiana Supreme Court denied T&B's writs in which T&B requested the Supreme Court to deny this Court the opportunity to enter another judgment in this case.

Kaiser moved this Court on January 30, 2007 for a judgment to be entered adopting the jury verdict, which was entered at that time. T&B filed exceptions of prematurity to the motions for new trial based on the judgment and the judgment as being pre-mature, as they were filed before the appellate process related to T&B's motion to dismiss Kaiser's appeal was complete. At T&B's request, this Court entered T&B's form of judgment on September 4, 2007, after Hayes' un-lodged appeal was dismissed by the Fifth Circuit. Kaiser and Hayes' motions for new trial were timely filed thereafter.

This Court finds that is appropriate to order a new trial in this case, as a matter of discretion, as there were numerous errors and irregularities in the trial, and because it would be a miscarriage of justice to leave the jury verdict in place, based upon the trial.

## ERRORS DURING TRIAL

The jury selection process was unusually difficult. Many potential jurors were either class members, or a family member of a class member. All class members and their family members were excused.

The anticipated length of the trial was a difficult issue. The trial did last just over six weeks. It was evident during the jury selection process that there was a potential problem with the jury venire.

There were some serious technical difficulties at the beginning of the trial, as the speaker system in the courtroom was not working, so many people complained that they could not hear the attorneys and witnesses. One of the court reporters hired by the defendants was unable to hear much of what was said. He was replaced after one or two days in the courtroom.

This was an unusually lengthy trial. Testimony was taken late into the evenings on several occasions. During trial, the lawyers for the parties and the court committed many errors. The record contains numerous objections to improper jury selection/venire, improper admission of testimony evidence due to violation of evidentiary rulings, improper exclusion of evidence, objections to T&B's counsel's counsel repeatedly testifying, mischaracterizing witness' testimony, and improperly commenting on testimony.

This Court committed certain errors during trial, including the failure to grant three motions for mistrial, which in retrospect, should have been granted. This Court failed to declare a mistrial sue sponte when Thomas & Betts witness violated the Court's sequestration order. This Court erroneously overruled objections to the jury venire as an unrepresentative cross section.

**LAW**

A trial court has the authority to order a new trial on its own motion, pursuant to Louisiana Code of Civil Procedure articles 1971 and 1973, so long as the trial court has continuing jurisdiction over the case, because a party has filed a motion for a new trial and/or a motion notwithstanding the verdict. *Horton v. Mayeaux,* 2005-1704 (La. 05/03/06), 931 So. 2d 338, 339.

The discretionary grounds for ordering a new trial under Louisiana Code of Civil Procedure article 1973 differ substantially from the mandatory grounds for granting a motion for a new trial under Louisiana Code of Civil Procedure article 1972, and differ from the grounds for granting a motion for a new trial based on a trial court's finding that the verdict is contrary to the evidence. *Horton,* 931 So. 2d at 344. *Horton v. Mayeaux* served to reconcile some confusion that was apparent in the fifth Circuit's reversal of this Court's discretionary grant of a new trial. *Horton,* 931 So. 2d at 338.

When a district court grants a motion for a new trial under Louisiana Code of Civil Procedure article 1972 on the grounds that the verdict is contrary to the law and/or evidence, the district court is indicating its belief that it must grant the motion due to some failing on the part of the jury to properly apply the law or the facts, *Horton*, 931 So. 2d at 344-345.

When a trial judge is convinced by his examination of the facts that the judgment would result in a

miscarriage of justice and grants a discretionary new trial under Louisiana Code of Civil Procedure article 1973, a new trial should be ordered. *Lawson v. Mitsubishi Motor Sales of America, Inc.*, 05-0257 (La. 09/06/06), 938 So. 2d 35, 54; *Horton v. Mayeaux,* 2005-1704 (La. 05/30/06), 931 So. 2d 338, 344; *Lamb v. Lamb*, 430 So. 2d 51 (La. 1983). In a motion for a new trial under Louisiana Code of Civil Procedure article 1973, the trial court may evaluate the evidence without favoring either party; it may draw its own inferences and conclusions; and evaluate witness credibility to determine whether the jury erred in giving too much credence to an unreliable witness. *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00), 772 So. 2d 94. When a trial court grants a new trial on discretionary grounds under Louisiana Code of Civil Procedure article 1973, its decision does not undermine the fact-finding function of the jury, and does indicate the lower court's concern with a substantial injustice. *Horton,* 931 So. 2d at 344-345, Granting of a new trial on discretionary grounds indicates that this Court is concerned that this was not a fair trial. *Horton,* 931 So. 2d at 345. This Court chooses to exercise its "virtually unlimited discretion to order a new trial on discretionary grounds as good grounds for doing so do exist." *See Horton,* 931 So. 2d at 345.

This Court finds its reasons for ordering a new trial are more wide and varied that [sic] the reasons underlying the trial court's grant of a conditional new trial in *Horton.* This Court ruled before that the jury's

error and conduct at trial resulted in a miscarriage of justice and does so now. *Horton,* 931 So. 2d at 345.

The law of the case does not prevent this Court form [sic] considering this motion for a new trial in light of *Horton v. Mayeaux, Avenue Plaza, L.L.C. v. Falgoust,* 96-0173 (La. 07/02/96), 676 So. 2d 1077, 1079. The law of the case is a discretionary guide, and ordinarily prevents appellate courts from reconsidering its own rulings of law on a subsequent appeal. *Avenue Plaza,* 676 So. 2d. at 1079. However, reconsideration is warranted when it is obvious that a determination is "patently erroneous" and "produced unjust results," *State of Louisiana v. Stirgus,* 05-259 (La. App. 5 Cir. 11/29/05), 917 So. 2d 559, 564, *citing State v. Davis,* 03-488 (La. App. 5 Cir. 11/12/03), 861 So. 2d 638, 642 fn. 2.

The Louisiana Supreme Court's writ denial was without reasoning, and therefore did not decide the substance of the issue raised by Kaiser/AXA's writ application and application for rehearing, and thus there is no "decision" that is given the effect of the law of the case. *In Re K.P.W.,* 03-1371 (La. App. 5 Cir. 05/26/04), 875 SO. 2d 903, 906. The Fifth Circuit's decision to reverse the [sic] this Court's grant of a new trial under Louisiana Code of Civil Procedure article 1973 fulfills the "patently erroneous" and "unjust results" tests of *Horton v. Mayeaux,* 931 So. 2d 338.

The Louisiana Supreme Court decided *Horton v. Mayeaux* in May of 2006, two months after the Fifth

Circuit denied this Court's judgment notwithstanding the verdict and motion for a new trial, and the Fifth Circuit was thus without the benefit of this instructional case from Louisiana's highest court. *Horton* served to reconcile and differentiate the standards of review accorded to a trial court's granting a motion for a new trial, and the Supreme Court held that it is necessary for a reviewing court to determine whether the grant of a new trial was on mandatory or discretionary grounds. *Horton,* 931 So. 2d at 344. In *Horton,* the Louisiana Supreme Court affirmed the trial court's grant of a new trial, on the basis of the court's comments to counsel to speed the trial along, and that the jury worked too late one night, in uncomfortable conditions for approximately thirty minutes. *Horton,* 931 So. 2d at 344. The Supreme Court urged that "the only requirement has been that the district court 'state an articulable reason or reasons as to why he is exercising his discretionary powers.'" *Horton,* 931 So. 2d at 345, *citing Burris v. Wal-Mart Stores, Inc.,* 94-0921 (La. App. 1 Cir. 03/03/95), 652 So. 2d 558, 562, *writ denied,* 95-0858 (La. 5/12/95), 654 So. 2d 352. In this case, there are many valid and articulable reasons which form the basis of its grant of a new trial.

**READ, RENDERED AND SIGNED** this 10th day of October, 2007, in Chambers in Donaldsonville. Louisiana.

/s/ [Illegible]

**PEGRAM J. MIRE, JR., JUDGE**
**23rd JUDICIAL DISTRICT COURT**
**DIVISION "D"**

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

MASTER DOCKET
NO. 25,975 "D"

23RD JUDICIAL DISTRICT COURT

PARISH OF ST. JAMES

STATE OF LOUISIANA

**Applies to:**

26,542 Todd Landry et al. v. Power & Control Systems, Inc. et al. (Intervention)

26,821 Kaiser Aluminum & Chemical Corp. v. Power & Control Systems, et al.

26.861 Terrence Hayes et al. v. MEI Corp. et al.

26,865 AXA Global Risks (U.K.) et al. v. Thomas & Betts Corp. et al.

Filed: Sept. 6 2007 /s/ [Illegible]
Deputy Clerk of Court

**Final Judgment on Jury Verdict**

By order of this Court, the captioned matters 26,542, 26,821, 26,861, and 26,865, as cases consolidated into master docket no. 26,975, came on for trial on all issues of liability and damages before a twelve-member jury on October 8, 2001. All other consolidated matters were tried at that time on the issue of liability only, except the matter entitled *CII Carbon L.L.C. v. Kaiser Aluminum & Chemical Corp., et al.*, bearing docket No. 26,837. The matter of *Todd Landry et al. v. Power & Control Systems, Inc.*, Docket No. 26,542 was tried on all issues of liability and damages raised in the intervention filed on

behalf of plaintiffs in *AXA Global Risks (U.K.) et al. v. Thomas & Betts Corp.*, Docket No. 26,865.

Accordingly, trial was had on all issues in cases 26,542, 26,821, 26,861, and 26,865, by and between the following plaintiffs:

- AXA Global Risks (U.K.), Allianz Insurance Company, Certain Underwriters at Lloyd's London, Compagnie Transcontinentale De Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company, all the foregoing as transferees and subrogees of rights formerly belonging to Trochus Insurance Company, Ltd. ("AXA, et al.");
- Terrence Hayes, individually and on behalf of his minor child, Jocelyn Pearl Hayes; and
- Kaiser Aluminum and Chemical Corporation;

and the following defendants:

- Thomas & Betts Corporation; and
- Schweitzer Engineering Laboratories, Inc.;

plaintiffs having settled or dismissed their claims against all other defendants originally named in this suit. Trial of this matter concluded on November 19, 2001, when the jury rendered its verdict in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against plaintiffs, assigning no fault to either Thomas & Betts Corporation or Schweitzer Engineering Laboratories, Inc., but apportioning fault to other parties appearing on the jury verdict form in accordance with Article 1812 of the Louisiana Code of Civil Procedure. Upon the reading of the jury verdict in open court and upon motion of counsel for Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., the Court adopted the jury's verdict as the judgment of the Court as follows:

It is ordered, adjudged and decreed that there be judgment in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against all claimants, including the plaintiffs named above, dismissing all claims against Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., however denominated, with full prejudice. Plaintiffs are hereby taxed with all costs, including expert-witness fees. The right of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. to move the court to set costs is hereby reserved.

It is further ordered that, in keeping with the requirements of Article 1916 of the Louisiana Code of Civil Procedure, the jury verdict apportioning fault

among the various parties be, and is hereby, adopted as the judgment of the Court, to wit:

| | |
|---|---|
| Schweitzer Engineering Laboratories, Inc. | 0% |
| Thomas & Betts Corp. | 0% |
| Kaiser Aluminum & Chemical Corporation | 75% |
| Certain other defendants as set forth in the jury verdict form | 25% |

Because the only parties adjudged at fault were dismissed before judgment was rendered, no written judgment as to damages is required or entered.

Read, rendered and signed in chambers at Donaldsonville, Louisiana, this 4th day of ~~June~~ September, 2007.

/s/ [Illegible]
Hon. Pegram J. Mire, Jr., Judge
23rd Judicial District Court
Division "D"

**IN RE: GRAMERCY PLANT EXPLOSION AT KAISER**

**NO. 2007-OC-0544**

**SUPREME COURT OF LOUISIANA**

**2007-0544 (La. 04/05/07); 954 So. 2d 132; 2007 La. LEXIS 864**

**April 5, 2007, Decided**

**JUDGES:** Pascal F. Calogero, Jr., Catherine D. Kimball, Bernette J. Johnson, Chet D. Traylor, Jeannette Theriot Knoll, John L. Weimer, VICTORY J., would grant.

**OPINION**

Stay denied. Writ denied.

VICTORY, J., would grant.

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*IN RE: GRAMERCY PLANT EXPLOSION AT KAISER*

*NO. 06-CA-871 c/w 06-CA-872, 06-CA-873, and 06-CA-874*

*FIFTH CIRCUIT*

*COURT OF APPEAL*

*STATE OF LOUISIANA*

***ORDER***

Mover, Thomas & Betts Corp. ("T&B"), seeks to have us dismiss Kaiser-AXA's appeal on the basis that all issues are *res judicata* pursuant to our prior opinion, *In re Gramercy Plant Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 3/28/06), 927 So.2d 492, *writ denied*, 2006-1003 (La. 9/1/06), 936 So.2d 190. In our previous opinion, however, we only addressed the issues of whether the trial court erred in granting a JNOV and new trial in favor of Kaiser-AXA; we reversed the judgment of the district court and reinstated the jury verdict, and the Louisiana Supreme Court subsequently denied writs.

Citing to the First Circuit's opinion in *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152, Kaiser asserts that its first opportunity to appeal the jury's verdict came after the supreme court denied writs from our opinion which reinstated the jury verdict. T&B argues, however, that, unlike the court in *Junot*, in our previous opinion we did not order the trial court to render and sign judgment on the jury verdict, allowing for all further proceedings or appeal as provided by law.

LSA-C.C.P. art. 2082 provides that an appeal can only be taken from a judgment of a trial court. In the present case, without a judgment of the trial court that adopts the original jury verdict, which does not presently appear in the record, Kaiser-AXA has no basis for appeal at this time. It would appear, however, this could be easily remedied by a motion from the defendant to the trial court.

Accordingly, for the foregoing reasons, T&B's Motion for Dismissal is granted. Each party is to bear its own costs.

***Gretna, Louisiana this 16th day of January, 2007.***

***FOR THE COURT:***

/s/ MFE
***JUDGE MARION F. EDWARDS***

/s/ WJR
***JUDGE WALTER J. ROTHSCHILD***

/s/ FHW
***JUDGE FREDERICKA HOMBERG WICKER***

**23rd JUDICIAL DISTRICT COURT**
**FOR THE PARISH OF ST. JAMES**

**STATE OF LOUISIANA**

**MASTER DOCKET NO. 25,975** **DIVISION "D"**

**APPLIES TO: 26,542**
**26,821**
**26,865**

**IN RE: GRAMERCY PLANT EXPLOSION AT KAISER**

**FILED:** August 9, 2006 /s/ J. Donaldsen
**DEPUTY CLERK**

**ORDER OF DEVOLUTIVE APPEAL**

Considering the foregoing motion of plaintiffs for an order of devolutive appeal,

**IT IS ORDERED** that Plaintiffs, AXA Global Risks (U.K.), Allianz Insurance Company, Certain Underwriters at Lloyd's London, Compagnie Transcontinentale de Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company, suing in their own names and in the names of Kaiser Aluminum and

Chemical Corporation, Kaiser Alumina Chemicals, Kaiser Jamaica, Ltd., Kaiser Bauxite Company, and Trochus Insurance Company, Ltd., are granted a devolutive appeal from the judgments on the jury's verdict which were signed by the trial court in the above cases on February 21, 2002.

Order signed in Donaldsonville, Louisiana, this 9th day of August, 2006.

/s/ [Illegible]
JUDGE PEGRAM MIRE,
DIVISION "D"
23rd JUDICIAL DISTRICT
COURT

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

(LODGED AS CARL BELL, ET AL. VERSUS KAISER ALUMINUM AND CHEMICAL CORPORATION)

NO. 04-CA-1151
C/W 04-CA-1152
THROUGH 04-CA-1191

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT PARISH OF ST. JAMES, STATE OF LOUISIANA, NO. 25975 c/w 25974 c/w 25979 c/w 25980 c/w 25984 c/w 25986 c/w 25997 c/w 25999 c/w 26542 c/w 26576 c/w 26591 c/w 26620 c/w 26655 c/w 26670 c/w 26671 c/w 26679 c/w 26775 c/w 26785 c/w 26817 c/w 26820 c/w 26821 c/w 26822 c/w 26826 c/w 26828 c/w 26829 c/w 26837 c/w 26839 c/w 26840 c/w 26841 c/w 26842 c/w 26843 c/w 26856 c/w 26860 c/w 26861 c/w 26863 c/w 26864 c/w 26865 c/w 26866 c/w 26868 c/w 26874 c/w 26876, DIVISION "D," HONORABLE PEGRAM J. MIRE, JR., JUDGE PRESIDING

March 28, 2006

**SUSAN M. CHEHARDY**
**JUDGE**

Panel composed of Judges Susan M. Chehardy, Clarence E. McManus, and Walter J. Rothschild

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***REVERSED; VERDICT REINSTATED***

This is an appeal in an action comprising numerous consolidated cases from the Twenty-Third Judicial District Court, St. James Parish, arising out of a massive industrial explosion at the Kaiser Aluminum plant in Gramercy on July 5, 1999. At issue on the appeal is the liability of one defendant, Thomas & Betts Corporation. We reverse the trial court's grant of judgment notwithstanding the verdict and reinstate the jury's verdict. We also reverse the trial court's grant of a conditional new trial.

## PROCEDURAL HISTORY

Originally there were 71 lawsuits arising from the Kaiser explosion, most of which were consolidated.[1] The plaintiffs included not only persons

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[1] After consolidation the district court assigned the suits the master case name of *In re: Gramercy Plant Explosion at Kaiser.* When the case was lodged on appeal, pursuant to this Court's internal policy it was filed under the name of the first of the consolidated cases, *Carl Bell v. Kaiser Aluminum, et al.*, No. 04-CA-1151 (23rd Judicial District Court No. 25,975). For uniformity of designation in the matter, however, we are ordering that the master case name be adopted as the name of the

(Continued on following page)

directly injured in the plant, but also inhabitants of the surrounding area, as well as commercial entities and insurers seeking compensation for property damage and business losses, and/or indemnification for any liability to other claimants.[2]

By the time of trial, all of the cases had been settled and/or dismissed except three: a suit by Kaiser Aluminum & Chemical Corporation ("Kaiser") for its uninsured losses caused by the explosion;[3] a personal injury suit by Kaiser employee Terrence Hayes ("Hayes");[4] and a suit by Kaiser's subrogated reinsurers – AXA Global Risks (U.K.), et al. (collectively "AXA") – for Kaiser's insured losses.[5]

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matter on this Court's records. The order is being issued in conjunction with release of this opinion.

[2] Most of the personal injury claimants were part of a class action, but others opted out of the class action to pursue their individual suits.

[3] *Kaiser Aluminum v. Power & Control Systems, Inc, et al.*, No. 04-CA-1171 (23rd Judicial District Court No. 26,821).

[4] *Terrence Hayes v. MEI Corporation, et al.*, No. 04-CA-1184 (23rd Judicial District Court No. 26,861).

[5] *AXA Global Risks (U.K.), et al. v. Thomas & Betts Corporation, et al.*, No. 04-CA-1187 (23rd Judicial District Court No. 26,865). The other reinsurers collectively included under the designation "AXA" are Allianz Insurance Company; Certain Underwriters at Lloyd's, London, individually subscribing to certain facultative reinsurance contracts issued to Trochus Insurance Company, Ltd., Compagnie Transcontinentale De Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance

(Continued on following page)

The defendants in these suits included Power & Control Systems, Inc. and Power & Control Systems International, Inc. (collectively "PCS"), which designed the electrical system at the Kaiser plant; MEI Corporation, MEI Electrical, Inc., Merit Electrical & Instrumentation, Inc., and Merit Electrical, Inc. (collectively "MEI"), and Excel Group, Inc., formerly known as Excel Electrical & Instrumentation, Inc. (collectively "Excel"), electrical contractors that performed work at the plant; Thomas & Betts Corporation ("T&B"), manufacturer of adhesive mounts used to hold wiring in the plant; Adhesives Research, Inc. ("ARI"), manufacturer of the adhesive used in the adhesive mounts; Walter Hansley, a worker alleged to have been instrumentally negligent in events leading to the explosion; Manpower, Inc., Manpower International, Inc. (collectively "Manpower"), the employers of Hansley; and Schweitzer Engineering Laboratories, Inc., manufacturer of an electrical relay used at the plant.

Kaiser/AXA (hereafter "Kaiser/AXA")[6] alleged that the explosion was caused by a power failure that began about a half-hour before the explosion and that

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Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company.

[6] Kaiser went through bankruptcy during the course of this suit, and the bankruptcy court allowed AXA to be subrogated to all Kaiser's claims. Hence, they are for practical purposes one party, "Kaiser/AXA."

the power failure was caused by concurrent fault of PCS, Schweitzer, MEI, Excel, T&B, and ARI. Kaiser/AXA contended the root cause of the power failure was improper installation of a handful of one-inch-square adhesive-backed cable-tie mounting bases (commonly referred to as "sticky-backs") inside high-voltage switchgear in an electrical building (Switch House 2) at the Kaiser plant.

Kaiser/AXA alleged the wiring ("CT leads") that was routed through the sticky-backs came into contact with a high-voltage bus bar when several sticky-backs came loose from the cabinet wall to which they were attached. Kaiser/AXA claimed the contact degraded the insulation on both the CT leads and the bus bar, eventually leading to a short-circuit (technically, a phase-to-ground fault). The fault caused a chain reaction, in which circuit breakers tripped on all three loop feeders supplying power to the plant, resulting in a power outage.

Kaiser/AXA alleged that PCS was negligent in failing to design the electrical system so that a fault in Switch House 2 would not take the entire electrical loop off-line and, further, that PCS was negligent in failing to program the computerized Schweitzer electrical relays properly. They alleged Excel was negligent for using sticky-backs inside high-voltage switchgear, where their coming loose could cause an electrical fault, and that T&B was liable for failure to warn Excel about the limitations inherent in the sticky-backs.

In response, T&B filed incidental actions against Kaiser and AXA, alleging that Kaiser destroyed, altered, concealed or denied T&B access to evidence bearing on the cause of the power failure.

The trial commenced on October 8, 2001 before a twelve-member jury, and continued over the course of 27 days.

Briefly, the evidence established that the explosion evolved following a power failure in Switch House 2, caused when electrical wiring that had been run along the side of a switchgear cabinet fell onto a piece of high-voltage bus bar, resulting in a phase-to-ground fault that interrupted power. Although Kaiser had a system that was supposed to isolate such power failures so that the whole plant would not be shut down, the system failed. Employees took actions intended to prevent overheating of the large towers (known as flash tanks) that process bauxite into alumina (a production phase in producing aluminum). However, the actions failed because some of the equipment was not operating properly. Within a short time the tanks overheated and exploded.

On November 19, 2001, the jury returned a verdict that absolved Schweitzer, T&B, and Hansley/Manpower of fault, but found that Kaiser, MEI, and PCS were at fault, their fault was a legal cause of the explosion, and apportioned their fault as follows: Kaiser, 75%; MEI, 5%; PCS, 20%. The jury awarded damages to Terrence Hayes in the amount of $20,307,000.00, but denied damages to his daughter

for loss of consortium, and denied damages to Kaiser, and to its insurers (AXA, et al.).

After the jury returned its verdict, Kaiser, AXA and Hayes filed motions for judgment notwithstanding the verdict (JNOV) and, alternatively, for new trial. The trial court granted JNOV in favor of Kaiser/AXA and against T&B, and also granted the motion for new trial conditionally, in the event the JNOV is reversed on appeal.

In the JNOV, the court found T&B to be 25% at fault, reduced Kaiser's allocation of fault to 60%, reduced the fault of PCS to 10%, and maintained the jury's fault allocation of 5% to MEI. The court also granted JNOV as to damages, awarding Kaiser/AXA combined damages of $335 million, $122 million less than the $457 million requested by Kaiser/AXA. Finally, the court provisionally granted Kaiser/AXA's motion for new trial, in the event the JNOV is [sic] be reversed on appeal, and ordered that the new trial be held in a different venue.

The JNOV maintained the jury's finding in favor of Hayes and also upheld the amount of the damage award to him.

## ISSUES ON APPEAL

Originally both T&B and Hayes appealed; Hayes, however, dismissed his appeal and only the issues raised by T&B are before us.

On appeal T&B makes the following assignments of error:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict, and granted Kaiser's and AXA's motion for judgment notwithstanding the verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La.C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

## LAW AND ANALYSIS

### JNOV

T&B contends the trial court committed legal error by granting a JNOV against T&B after the jury exonerated T&B.

The Louisiana Products Liability Law, the basis for liability of T&B, provides in pertinent part:

> A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.
>
> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> * * *
>
> (2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

La.R.S. 9:2800.57.

In granting the JNOV, the trial court gave extensive written reasons within the judgment. He stated, first, the court had denied the plaintiffs' motion for a directed verdict against T&B at the close of trial because "the Court was of the opinion that it could be a jury question whether or not the power outage was a substantial cause in fact of the explosion."

> There was no question in the court's mind as to whether reasonable and fair minded men would find that Thomas & Betts had failed in its duty as set out under the

> LPLA by its complete failure to warn. The jury did find that the Thomas & Betts product failed in service, as is evident by their finding that the acts of Excel/MEI and PCS were legal causes of the accident and explosion. There is no other reasonable explanation for the attribution of fault to Excel/MEI and PCS. Having found that the power outage was cause [sic] by the failure of the Thomas & Betts product (the only work Excel/MEI performed that could be related in any way to the accident and explosion) this court believes the jury had to attribute fault to Thomas & Betts, whose product failed to satisfy the minimum requirements of products in Louisiana. As the jury failed to fulfill their responsibility to require this manufacturer to comply with its duty, this Court will rectify that problem. . . .

Finding that the jury erred, the court held that "the facts, inferences and the LPLA standards . . . point so favorably to the conclusion that Thomas & Betts bears fault for this accident and that Kaiser/AXA suffered substantial damages, that reasonable men could not reach the decision made by the jury," and granted the motion for JNOV, listing these reasons:

> With respect to liability, the court finds that Kaiser, Thomas & Betts, Excel/MEI and PCS all bore fault for this event. The court finds that Kaiser bore the majority of the fault through the acts of its employees and through its failure to have its overpressure

safety systems fully operational on the day of the accident, and assigns Kaiser 60% of the fault for the overall event. Thomas & Betts products were amply proven to be defective and not in compliance with the LPLA, and the power outage was acknowledged by the jury to be a causative factor in the overall event. I agree with the jury finding that the electrical outage was a substantial causative factor in the overall event. I assign the next highest responsibility for the overall accident to Thomas & Betts, to which I assign 25% fault. Thomas & Betts had specific knowledge with respect to suitability and use of their product which they withheld from the public. It is obvious that marking a product "for temporary use only" would reduce sales of that product. The court finds that Thomas & Betts made a choice to enhance its sales instead of properly warning the public about its product limitations, of which it was well aware. Excel/MEI, the electricians who installed the Thomas & Betts product, were found by the jury to have borne 5% of the fault for their use of the T&B product, which conclusion I will not disturb. PCS, the engineering overseers of Excel/MEI and programmer of the Schweitzer relays for Kaiser was found by the jury to bear 20% of the fault for this accident. As Thomas & Betts provided the engineering diagram to any of its customers who asked, which shows the intended use of the product to be identical to the manner in which Excel/MEI and PCS used it, I will reduce the fault of PCS to 10%.

> I concur with the jury, and do not find Schweitzer Engineering Labs to have borne any fault for this particular power outage or accident. I also concur with the jury and do not find Walter Hansley/Manpower to have borne any fault to this particular accident.

A motion for JNOV may be granted on the issue of liability or on the issue of damages or on both issues. La.C.C.P. Art. 1811(F). The strict criteria for granting judgment notwithstanding the verdict (JNOV) is predicated on the rule that when there is a jury, the jury is the trier of fact. *Smith v. State, Dept. of Transp. & Development,* 04-1317, 2004-1594 (La. 3/11/05), 899 So.2d 516.

> [A] JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences

> or factual questions should be resolved in favor of the non-moving party.

*Trunk v. Medical Center of Louisiana at New Orleans*, 04-0181, p. 4 (La. 10/19/04), 885 So.2d 534, 537, citing *Joseph v. Broussard Rice Mill, Inc.*, 00-0628, pp. 4-5 (La. 10/30/00), 772 So.2d 94, 99; see also *VaSalle v. Wal-Mart Stores, Inc.*, 01-0462, p. 11 (La. 11/28/01), 801 So.2d 331, 338-39.

> In reviewing a JNOV, an appellate court must first determine whether the district judge erred in granting the JNOV by using the above-mentioned criteria in the same way as the district judge in deciding whether to grant the motion. Thus, the appellate court must determine whether the "facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict." If the appellate court determines that reasonable persons might reach a different conclusion, then the district judge erred in granting the motion and the jury verdict should be reinstated. [Citations omitted.]

*Trunk*, 04-0181 at p. 5, 885 So.2d at 537.

In ruling on a motion for a judgment notwithstanding the verdict (JNOV), the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party; this rigorous standard is based upon the principle that when

there is a jury, the jury is the trier of fact. *Martin v. Heritage Manor South Nursing Home,* 00-1023 (La. 4/3/01), 784 So.2d 627.

T&B asserts a reasonable jury could find Excel negligent for failing to comply with Kaiser's general specifications governing Excel's work. T&B states there is ample basis for a reasonable jury to assign fault to Excel and PCS without assigning fault to T&B. For example, the jury could have decided Excel was negligent in failing to understand or follow Kaiser's general specifications for the job, which required the CT leads to be enclosed in flexible metal conduit. (It was uncontested that had conduit been used, the power failure would not have occurred.)

In addition, T&B argues, the jury could reasonably expect that Excel, a professional electrical contractor, already knew or should have known about the obvious limitations of a peel-and-stick wire mount and the inappropriateness of using such a product in a high-voltage cabinet.

Further, negligent programming of the Schweitzer relays by PCS escalated a fault in a single switch house into a plant-wide power failure.

Finally, T&B urges that the jury's reasonable allocation of fault mandates reversal of the JNOV. Specifically, T&B avers, the 25% fault assigned to the electricians (PCS & Excel) and the 75% fault allocation to Kaiser are reasonable allocations of fault.

With respect to T&B's liability, the evidence was that William Philyaw bought a package of T&B mounting bases, which he had used on numerous prior occasions. He used these adhesive-backed plastic bases to attach low-voltage electrical control wires to the wall in a switchgear cabinet at the Kaiser plant. Philyaw was an employee of electrical contractor Excel.[7]

By July 5, 1999, 13 months after they were installed, all of the T&B mounts in the switchgear cabinet had fallen off the wall and the wires they previously supported were loose and sagged against a high-voltage bus bar. The resulting phase-to-ground fault ultimately resulted in the explosions and catastrophic damage.

Philyaw said at trial he would not have used the T&B bases if T&B had supplied warnings that the bases were not intended for permanent installations. T&B points out, however, that Philyaw must have known that the sticky-backs might come loose over time, because he said he tried to route the wires so that if for some reason the wire came off the wall, it would not contact the bus bar.

Philyaw denied knowing the sticky-backs might loosen, but a reasonable jury could find his actions

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[7] Excel is also referred to as "Excel/MEI" because it either merged with or was bought by MEI.

indicated otherwise. Philyaw admitted he had seen a few sticky backs come off walls before.

There was also testimony that Kaiser's engineer, Ken Scannapiego, knew that sticky-backs may detach from the surface, and that Kaiser's electrical maintenance superintendent, John Scavona, would not have used the product in a high voltage application.

It is the jury's prerogative to assess witness credibility. In ruling on a motion for JNOV, the trial court may not evaluate credibility, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party. *Joseph v. Broussard Rice Mill, Inc.*, 00-628, p. 5, 772 So.2d at 99.

The issue for the trial court was whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not arrive at a contrary verdict. Despite the trial court's statement, we conclude that reasonable persons could arrive at a contrary verdict, as this jury did.

The jury was allowed to view and handle sticky-backs during the trial. In looking at them, the jury could decide for themselves whether the limitations of the product – a one-inch square piece of plastic, with three channels on the top surface and an adhesive-backed foam pad on the back surface – should have been obvious to Excel and its employee, Philyaw, as well as to Kaiser, which inspected the work done by its electrical contractors.

It is reasonable for the jury to decide that a person – in particular, a professional wiring installer – should perceive the obvious limitations of the item. Further, it is reasonable for the jury to decide that Philyaw's actions demonstrated awareness of the risk.

Further, regarding the argument that T&B's failure to include a warning about temporary use versus permanent use violated the LPLA, the adequacy of any particular warning is a question for the jury. *Reilly v. Dynamic Exploration, Inc.*, 571 So.2d 140, 145 (La. 1990). The testimony by the Kaiser/AXA expert, Jerry Householder, and T&B's expert, Jerry Purswell, directly conflicted. Purswell compared the sticky-back to a nail – another simple fastening device that can be used in temporary or permanent settings, and which generally comes with no warnings. It was the jury's province to decide which witness's testimony to credit. A reasonable jury could have decided that a sticky-back, like a nail, does not need the kinds of warnings that Kaiser/AXA argues for.

Additional questions for the jury decision were proximate cause and allocation of fault. La.R.S. 9:2800.54 provides,

> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from

a reasonably anticipated use of the product by the claimant or another person or entity.

B. A product is unreasonably dangerous if and only if:

* * *

(3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57. . . .

When there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the accident. Whether the defendant's conduct was a substantial factor in bringing about the harm, and, thus, a cause-in-fact of the injuries, is a factual question to be determined by the factfinder. *Theriot v. Lasseigne,* 93-2661, p. 5 (La. 7/5/94), 640 So.2d 1305, 1310.

The jury here may reasonably have allocated fault according to the parties' control over, or the role played by, the instrumentalities that caused the explosion. Kaiser (assigned 75% fault by the jury) controlled the entire plant, including the electrical system, the vessels that exploded, and the nonfunctioning pressure-relief systems that directly caused the explosion.

PCS (assigned 20% fault by the jury) erroneously programmed the Schweitzer relays, which was a direct cause of the plant-wide power failure. However, PCS's failure was an indirect, less proximate cause of the explosion compared to Kaiser's misconduct.

The jury allocated only 5% fault to Excel, and reasonably may have found that Excel's wiring in the switch house was an indirect cause of the power failure and that intervening, independent negligence by PCS was required to turn the electrical fault in Switch House 2 into a large-scale power failure, and that much greater intervening negligence by Kaiser was required to turn the power failure into an explosion.

Unlike Excel, T&B could not have known the risk created by the proximity between the CT leads and the high-voltage bus bars. Further, since Philyaw testified he never saw any of the warnings or instructions accompanying the stick-backs, the jury could reasonably find that any alleged deficiency in the warnings or instructions was not a proximate cause of any of the events.

Even when a plaintiff proves that the lack of an adequate warning or instruction rendered a product unreasonably dangerous, a presumption arises that the user would have read and heeded such admonitions. *Bloxom v. Bloxom,* 512 So.2d 839, 850 (La. 1987). The presumption, may, however, be rebutted if the manufacturer produces contrary evidence which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances. *Id.*

Considering all the above factors, we conclude that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different

conclusions." *Trunk,* 04-181, p. 4, 885 So.2d at 537. Accordingly, we find the trial court erred in granting the motion for judgment notwithstanding the verdict.

**New Trial**

In granting the conditional motion for new trial, the trial court included the following written reasons within the judgment:

> I have the right to grant a new trial under purely discretionary grounds under CCP art. 1973, which I would do if I did not grant the JNOV, or would do in the alternative. In retrospect, there were multiple occasions during the six weeks of trial when it may have been appropriate to grant some of the Motions for Mistrial that were orally argued. Virtually all of the lawyers made mistakes at one point or another during this over six week trial.
>
> * * *
>
> If the JNOV is overturned by the Court of Appeal, fundamental fairness, the difficulty in picking a jury that does not have pre-conceived ideas about Kaiser, and the errors and irregularities that occurred during this lengthy trial mandate a new trial.
>
> I note that CCP art. 1813(E) also provides a potential basis for a new trial, as the special verdict form as completed by the jury contained irreconcilable answers.

> I have the right to grant a new trial if the judgment is contrary to law and/or to evidence under CCP art. 1972. I would do so under this article as well. Some of the reasoning for granting a new trial under CCP art. 1972 is outlined by the reasons in support of the JNOV, and the other reasoning outlined above.

T&B contends the trial court erred by granting plaintiffs' alternative motion for a new trial in a new forum, because the jury's fair interpretation of the evidence precludes new trial under La.C.C.P. art. 1972(1) and new trial pursuant to La.C.C.P. art. 1973 is not warranted because the verdict is not a miscarriage of justice. Further, T&B asserts, there is no basis for a change of venue.

A party may join a motion for new trial with a motion for judgment notwithstanding the verdict, or may pray for a new trial in the alternative. La.C.C.P. art. 1811(A)(2). If the court grants the motion for judgment notwithstanding the verdict, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for a new trial. La.C.C.P. art. 1811(C)(1). If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court orders otherwise. La.C.C.P. art. 1811(C)(2).

A motion for a new trial requires a less stringent test than for a judgment notwithstanding the verdict (JNOV), as such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury. *Davis v. Wal-Mart Stores, Inc.*, 00-0445 (La. 11/28/00), 774 So.2d 84.

A conditional grant of a new trial is not to be used to give the losing party a second bite at the apple without facts supporting a miscarriage of justice that would otherwise occur. *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00), 772 So.2d 94.

In several recent cases, our supreme court has ruled that when a JNOV is reversed on determination that the jury's verdict was reasonable in light of the evidence presented, the conditional new trial also should be reversed.[8] We find that reasoning applicable here, and conclude the trial court abused its discretion in granting the conditional new trial.

Since we have determined the trial court erred in granting the conditional new trial, the issue of change of venue is moot. Accordingly, we need not address it.

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[8] *Trunk*, 04-181, p. 11, 885 So.2d at 540 ("Because we have previously concluded that the jury's verdict was reasonable in light of the evidence presented, we find that plaintiff is not entitled to a new trial."); *see also, VaSalle*, 01-462, p. 18, 801 So.2d at 342; *Davis v. Witt*, 02-3102, p. 23, 851 So.2d at 1134 ("When any fair interpretation of the evidence supports the jury's verdict, the grant of a new trial must be reversed.").

## DAMAGES

Our reversal of the JNOV also eliminates the trial court's award of damages to Kaiser; hence, we need not address T&B's assignment of error on this issue.

## DECREE

For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.

***REVERSED; VERDICT REINSTATED.***

IN RE: GRAMERCY PLANT EXPLOSION

AT KAISER

MASTER DOCKET NO. 25,975 "D"

APPLIES TO: ALL CASES

FILED: Dec. 17, 2002

STATE OF LOUISIANA

PARISH OF ST. JAMES

/s/ [Illegible]
DEPUTY CLERK OF COURT

## JUDGMENT AND REASONS

**THIS MATTER** came before the Court as Judgment Notwithstanding the Verdict and/or In the Alternative, Motion for New Trial/Change of Venue.

This case involves the explosions at the Kaiser Gramercy facility in the early morning hours of July 5, 1999, and the injuries and damages that flowed from the explosions. The trial was held from October 15, 2001 through November 19, 2001. All plaintiffs who had not fully settled their claims were present for the liability trial against all remaining defendants. Damages cases were put on by one of the badly injured Kaiser workers, Terrence Hayes, and by Kaiser and its property insurers, which this court collectively refers to as Kaiser/AXA.

At trial, plaintiffs claimed that an entire plant electrical outage or blackout occurred, which was followed about one half hour later by an explosion or series of explosions that destroyed much of the plant, injured many plant workers, some very badly, caused property damages inside and outside of the plant and

disrupted the lives of many residents of Gramercy and the surrounding areas, some of whom claim physical and emotional injuries resulting from the explosions.

The plaintiffs claimed that the electrical outage was caused by the failure of some Thomas & Betts adhesive backed mounting plates, which they claimed fell off a high voltage electrical cubical enclosure wall, which allowed a 120 volt wire to contact a 7,000 volt bus bar, causing a short circuit and forcing the interruption of power to the plant.

Thomas & Betts defended by admitting that the adhesive based mounts did fall off the wall, but claimed that the adhesive backed mounts fell off the wall after the bus bar experienced the short circuit, and did not fail before the short circuit, and that even if the adhesive backed mounts did fail and cause the power outage, that the power outage was not a legal cause of the explosion. Thomas & Betts claimed that Kaiser caused the explosion by its failure to properly supervise and train its own employees, and by its failure to have adequate pressure relief valves and clean relief piping in place to protect the plant from pressure surges during power outages.

The claim against Schweitzer Engineering Labs was that the Schweitzer relay, a computer that is an advanced form of circuit breaker, failed to react to the short circuit in time to pick and choose to open the correct circuit breakers to keep part of the power available to critical areas of the plant, and for

Schweitzer's failure to warn that its components should not have been used with wiring installed using Thomas & Betts adhesive backed mounting plates.

Schweitzer defended by claiming that any choice of, installation of, and programming of its relay was done by the engineering firm, PCS, and that its printed materials were sufficiently clear that signal wires were to be securely fastened to any enclosure. Schweitzer claimed that Kaiser was responsible for the loss for the same reasons stated by Thomas & Betts.

The claim against Excel/MEI was that Excel/MEI installed the low voltage wiring (that was used with the Schweitzer relay) using Thomas & Betts adhesive backed mounts, which mounts ultimately failed, and that the failure of the Thomas & Betts mounts was a precipitating cause of the power outage that preceded and caused the explosions.

Excel/MEI responded that it used the Thomas & Betts products in the exact manner in which Thomas & Betts indicated that they should be used and according to the directions provided by Thomas & Betts, that it believed that the Thomas & Betts adhesive backed mounts were permanent products, and that even if the adhesive based mounts fell off the wall before the short circuit, that the loose wire did not contact the 7,000 volt bus bar and was not the cause of the short circuit. Excel/MEI claimed that Kaiser was responsible for the loss for the same reasons stated by Thomas & Betts.

The claim against PCS, a group of power control engineers, was that they oversaw the installation of the Thomas & Betts adhesive based mounts by MEI/ Excel, chose the Schweitzer relays, programmed the Schweitzer relays, and that the work did not perform as Kaiser was told it would.

PCS defended that it followed the Schweitzer documentation, that the short circuit or fault occurred at a spot at which the Schweitzer relay would not be expected to see the problem, that the Thomas & Betts product was acceptable for the use to which it was put, that Kaiser also supervised and approved the installation of the Schweitzer relays and the Thomas & Betts adhesive based mounts, and that Kaiser was responsible for the loss for the same reasons stated by Thomas & Betts.

The claim against Manpower was that they were responsible for the acts of their temporary employee, Walter Hansley, who was working at the Kaiser plant as a Manpower employee, and who, during the emergency caused by the power outage, had controlled the slurry and steam flows in the Kaiser vessels (digesters and flash tanks) in a way that allowed pressures and flows to build up beyond what the vessels were designed to accept. Hanley had been trained as a control room operator by Kaiser and had worked for Kaiser for about 30 years before retiring and being hired back into the plant as a Manpower employee. Manpower settled with all parties before and during the early days of the trial. Very little was said about Manpower during the trial.

The jury rendered its verdict on November 19, 2001 in which it found responsibility on the part of Kaiser, PCS and MEI/Excel for the explosion and damages. The jury exonerated Manpower, Thomas & Betts, and Schweitzer. All plaintiffs subsequently brought Motions for JNOV and for New Trial requesting a JNOV against Thomas & Betts and in the alternative, a new trial against Schweitzer and Thomas & Betts. The post trial motions were argued and taken under advisement, and shortly thereafter, Kaiser filed for bankruptcy protection under Chapter 11 of the United States bankruptcy code. Kaiser's interest in this matter has recently been released from bankruptcy court supervision.

JNOV

The Supreme Court's test for consideration of a motion for a JNOV is provided in *Joseph v. Broussard Rice Mill, Inc.*, 772 So.2d 94, 99 (La. 2000); which ruling was recently cited, adopted and approved again in *VaSalle v. Wal-Mart Stores*, 801 So.2d 331 (La. 2001) reh. Den., in which the Court held:

> "JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when

> there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions."

There is only one person who testified as to why the T&B product was stuck to the wall in the enclosure. William Philyaw was the supervisor for Excel/MEI who installed the Thomas & Betts adhesive backed mounts in the electrical cabinet, which mounts eventually fell off the wall. Mr. Philyaw testified that he used the T&B product on the high voltage cabinet enclosure wall because he thought it was a product that would support the wires to the wall permanently. He further testified that if he had known that Thomas & Betts would only recommend them for temporary use, and not as a permanent support device, that he would have used something else. He testified that he read the instructions on the bag and followed them.

Even some of Thomas & Betts' own witnesses, including experts, testified that they did not know that these Thomas & Betts adhesive based mounting bases should not be used in a permanent electrical application until they were told as much by Thomas & Betts in connection with this case.

The packaging used for the Thomas & Betts product has minimal instructions and warnings provided by Thomas & Betts to the public. Additional

information is provided by Thomas & Betts only upon request by customer or an engineer. The Thomas & Betts engineering sales drawing, which was distributed to the public when additional information on the product was requested, shows the Thomas & Betts product in use in the same application as it was used at Kaiser. There was no testimony that anyone involved in the installation of electrical wires requested or reviewed the engineering sales drawing, however it is indicative of what MEI/Excel or PCS would have received from Thomas & Betts about the product that was used, had they made a special request for more information.

According to T&B's own experts, the product was miss-applied [sic], as it did not belong in this location, supporting wires. The product had no warnings not to use the product to support wires, and instead, was sold as a product to support wires.

The plaintiff bears the burden of proof that 1) The manufacturer's product possesses a characteristic rendering the product unreasonably dangerous, 2) that this characteristic "proximately caused" the damage, and (3) that these damages "arose from a reasonably anticipated use of the product." Plaintiffs successfully fulfilled these requirements. 1) The Thomas & Betts adhesive backed mounts were known by Thomas & Betts to fail in normal service and to be useful only as temporary supporting devices, which information was not provided to the public; 2) The jury found that the failure of the adhesive backed mounts installed by MEI/Excel was a proximate

cause of the explosion and damages; and 3) the Thomas & Betts engineering sales drawings demonstrates the use at the Kaiser plant of these mounts to be a reasonably anticipated use of the product.

The Thomas & Betts product in use at Kaiser before the explosion was unreasonably dangerous as a result of its lack of warnings, which product failed to meet the requirements of LSA R.S. 9:2800.54A and B(3) and 9:2800.57A and C, Louisiana's Products Liability Act (LPLA) explicitly requires that a manufacturer, in order to be relieved of his duty to warn, prove that the user or handler of the product already knew or reasonably should have been expected to know of the product's dangerous characteristic; the statute does not authorize courts to judicially notice or assume ipse dixit that a particular purchaser is a sophisticated intermediary with respect to a specific latent dangerous characteristic of a product. Swope v. Columbian Chemicals Co., C.A.5 (La.)2002, 281 F.3d 185. Thomas & Betts did not so prove. As a matter of law, LSA R.S. 9:2800.57B(1) and (2) were not proven by Thomas & Betts at trial.

PCS and Excel could not have been held responsible for this accident by the jury unless the electrical outage was a proximate cause of the explosion. Excel's responsibility could only be based upon the use of the T&B adhesive based mount. The uncontroverted evidence was that William Philyaw, who installed the Thomas & Betts adhesive backed mounts in the high voltage electrical cabinet, believed the T&B adhesive based mounts were to be used as a

permanent mounting device to hold wires against the wall of the cabinet, and he followed the instructions on the bag that were provided by Thomas & Betts. He further testified that had Thomas & Betts warned or instructed that the mounts were to be used for temporary applications only, he would not have used the mounts in that application.

JNOV after denial of Directed Verdict

When Plaintiffs requested a directed verdict against Thomas & Betts at the close of the trial, while the Court believed that the power outage was a substantial cause in fact of the explosion, the Court was of the opinion that it could be a jury question whether or not the power outage was a substantial cause in fact of the explosion. There was no question in the court's mind as to whether reasonable and fair minded men would find that Thomas & Betts had failed in its duty as set out under the LPLA by its complete failure to warn. The jury did find that the Thomas & Betts product failed in service, as is evident by their finding that the acts of Excel/MEI and PCS were legal causes of the accident and explosion. There is no other reasonable explanation for the attribution of fault to Excel/MEI and PCS. Having found that the power outage was caused by the failure of the Thomas & Betts product (the only work Excel/MEI performed that could be related in any way to the accident and explosion) this court believes that the jury had to attribute fault to Thomas & Betts, whose product failed to satisfy the minimum

requirements of products in Louisiana. As the jury failed to fulfill their responsibility to require this manufacturer to comply with its duty, this Court will rectify that problem. That this court denied the motion for directed verdict at the conclusion of trial does not mean that the court cannot grant the JNOV. Delaney v. Whitney Nat. Bank, 703 So.2d 709 (4th Cir. 1997), reh. den., writ den. (1998).

The jury erred. The facts, inferences and the LPLA standards established in the record point so favorably to the conclusion that Thomas & Betts bears fault for this accident and that Kaiser/AXA suffered substantial damages, that reasonable men could not reach the decision made by the jury, so the motion for JNOV is granted.

With respect to liability, the court finds that Kaiser, Thomas & Betts, Excel/MEI and PCS all bore fault for this event. The court finds that Kaiser bore the majority of the fault through the acts of its employees and through its failure to have its overpressure safety systems fully operational on the day of the accident, and assigns to Kaiser 60% of the fault for the overall event. Thomas & Betts products were amply proven to be defective and not in compliance with the LPLA, and the power outage was acknowledged by the jury to be a causative factor in the overall event. I agree with the jury finding that the electrical outage was a substantial causative factor in the overall event. I assign the next highest responsibility for the overall accident to Thomas & Betts, to which I assign 25% fault. Thomas & Betts had

specific knowledge with respect to the suitability and use of their product which they withheld from the public. It is obvious that marking a product "for temporary use only" would reduce the sales of that product. The court finds that Thomas & Betts made a choice to enhance its sales instead of properly warning the public about its product limitations, of which it was well aware. Excel/MEI, the electricians who installed the Thomas & Betts product, were found by the jury to have borne 5% of the fault for their use of the T&B product, which conclusion I will not disturb. PCS, the engineering overseers of Excel/MEI and programmer of the Schweitzer relays for Kaiser was found by the jury to bear 20% of the fault for this accident. As Thomas & Betts provided the engineering diagram to any of its customers who asked, which shows the intended use of the product to be identical to the manner in which Excel/MEI and PCS used it, I will reduce the fault of PCS to 10%. I concur with the jury, and do not find Schweitzer Engineering Labs to have borne any fault for this particular power outage or accident. I also concur with the jury and do not find Walter Hansley/Manpower to have borne any fault to this particular accident.

With respect to damages, having found that the JNOV should be granted, this court is to review the damages awards de novo, and is not constrained by the restriction that applies to the Court of Appeals that any increase or decrease be limited to the lowest (or highest) point reasonably within the discretion

afforded the Court of Appeals. *Langlinais v. Figueroa*, 636 So.2d 983 (5th Cir. 1994).

The court does not find any fault with the jury's damage award to Mr. Hayes.

Thomas & Betts' own expert, Barry Mabry, testified that Kaiser/AXA suffered damages of no less than $252,000,000.00. Kaiser's expert, Harold Asher, testified that Kaiser suffered losses of over $450,000,000.00, which included uninsured losses of approximately $150,000,000 over and above the $304,500,000 that Kaiser was paid by its property insurers, AXA. AXA's representative, Gary Reeve testified that over $304,500,000 was paid by AXA to Kaiser for insured losses. AXA's economist, Mike Daigle, testified that AXA's reimbursable losses from a tortfeasor should be equal to the payments it made under its policy to Kaiser.

This court is of the opinion that some of the $304,500,000.00 in payments to Kaiser made under the insurance policy issued by AXA are not necessarily reimbursable to Kaiser or to AXA by a tortfeasor. I find the AXA component of the Kaiser/AXA damages to be $295,000,000. This court also is of the opinion that some, but not all, of the $150,000,000.00 claimed uninsured and unreimbursed losses sustained by Kaiser are taxable against a tortfeasor. I find that $40,000,000 of Kaiser's claimed uninsured losses are taxable against the tortfeasors. This court finds that the combined taxable damages sustained by Kaiser and AXA was $335,000,000.00.

New Trial

In the alternative, the plaintiffs have moved for a new trial. Having granted the motion for a judgment notwithstanding the verdict, I must now consider the motion for new trial. LSA C.C.P. art. 1811.

"When a trial judge is convinced by his examination of the facts that the judgment would result in a miscarriage of justice, a new trial should be ordered." Lamb v. Lamb, 430 So.2d 51 (La. 1983). Lamb v. Lamb was a divorce case in which reference to all of the technical rules would not result in the granting of a new trial. Only by resorting to concern about equity and a miscarriage of justice could the Supreme Court order a new trial.

I have the right to grant a new trial under purely discretionary grounds under CCP art. 1973, which I would do if I did not grant the JNOV, or would do in the alternative. In retrospect, there were multiple occasions during the six weeks of trial when it may have been appropriate to grant some of the Motions for Mistrial that were orally urged. Virtually all of the lawyers made mistakes at one point or another during this over six week trial.

> "In Searle v. Travelers Insurance Company, 557 So.2d 321, 323 (La.App. 4 Cir.1990), the Fourth Circuit said: The Louisiana Code of Civil Procedure does not expressly provide for mistrials, and the jurisprudence concerning motions for mistrial is limited. Generally, mistrials are properly granted because of some fundamental failure in the proceeding.

> 76 Am.Jur.2d, Trial Sec. 1073. It is well settled in Louisiana law that a motion for mistrial in a civil case should be granted under the following circumstances:
>
> (1) when, before the trial ends and the judgment is rendered, the trial judge determines that it is impossible to reach a proper judgment because of some error or irregularity and
>
> (2) where no other remedy would provide relief to the moving party. Spencer v. Children's Hospital, 432 So.2d 823, 826 (La.1983); Streeter v. Sears, Roebuck & Co., 533 So.2d 54, 62 (La.App. 3d Cir.1988), writ denied 536 So.2d 1255 (La.1989), Motions for mistrial should also be granted upon proof of prejudicial misconduct occurring during a jury trial, which cannot be cured by admonition or instructions, 76 Am.Jur.2d, Trial Sec. 1072."
>
> Alfonso v. Piccadilly Cafeteria, Inc., 665 So.2d 589, 593 (La.App. 5 Cir. 11/28/95).

If the JNOV is overturned by the Court of Appeal, fundamental fairness, the difficulty in picking a jury that does not have pre-conceived ideas about Kaiser, and the errors and irregularities that occurred during this lengthy trial mandate a new trial.

I note that CCP art. 1813(E) also provides a potential basis for a new trial, as the special verdict form as completed by the jury contained irreconcilable answers.

I have the right to grant a new trial if the judgment is contrary to law and/or to evidence under CCP art. 1972. I would do so under this article as well. Some of the reasoning for granting a new trial under CCP art. 1972 is outlined by the reasons in support of the JNOV, and the other reasoning outlined above.

Venue

The reasons for change of venue within this district espoused by Thomas & Betts and by Manpower, Inc. before trial are generally adopted and accepted by the Court. The Manpower brief referenced the many news articles that were published that criticized Kaiser, its actions, its maintenance, its safety record and its strike breaking workers and Manpower did not believe that Kaiser could get a fair trial in St. James Parish. Thomas & Betts adopted Manpower's brief by reference. The court was concerned before trial and has concluded that Kaiser can not [sic] have an impartial jury impaneled in this Parish as a result of the numerous controversies that it has had with its unions, its retirees, and the class members. It is the belief of this court that everyone in this Parish was well aware, before this current litigation, that Kaiser had locked out its union and operated with non-union employees for a lengthy period of time before the explosion. The picket line was an obvious landmark on Airline Highway for an extended period of time. The local newspapers reported on the strike and on Kaiser's disputes with its employees. The difficulties encountered in picking a jury

for this particular case are obvious from a review of the selection process.

Whatever the prejudice that existed before the trial, the results of the first trial, in which Kaiser was found to be significantly at fault, were published and are common knowledge among the general population. The local sentiment toward Kaiser, not just before this trial, but after this trial is well known to this court. The fact that these claims arose as the result of an accident that occurred during Kaiser's union lockout, cannot be ignored.

The Court finds that this matter could have and should have been transferred to a different venue within this district for trial. In the event that the court of appeals overturns the JNOV, then this matter will be transferred to a different Parish within this district for the new trial.

**IT IS ORDERED, ADJUDGED AND DECREED** that the Judgment Notwithstanding the Verdict be and the same is hereby granted as follows:

With respect to liability, the Court assigns to Kaiser, sixty (60%) percent of fault; Thomas & Betts, twenty-five (25%) percent of fault; Excel/MEI, five (5%) percent; and, PCS, ten (10%) percent of fault.

With respect to damages, the Court finds as follows:

Damages sustained by Kaiser and AXA is THREE HUNDRED THIRTY FIVE MILLION ($335,000,000.00) DOLLARS

Damages sustained by Mr. Hayes will remain per jury award, TWENTY MILLION THREE HUNDRED SEVEN THOUSAND ($20,307,000.00) DOLLARS total.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Motion for New Trial in the Alternative is hereby GRANTED and the Motion for Change of Venue in the Alternative is hereby GRANTED.

**JUDGMENT READ, RENDERED AND SIGNED** in Chambers at Donaldsonville, Louisiana this 16th day of December, 2002.

/s/ [Illegible]
HON. PEGRAM J. MIRE, JR., JUDGE
23RD JUDICIAL DISTRICT COURT
DIVISION "D"

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

MASTER DOCKET NO. 25,975 "D"

STATE OF LOUISIANA

PARISH OF ST. JAMES

23rd JUDICIAL DISTRICT COURT

**Applies To:**

25,974 (Kevin Weber)
25,975 (Carl Bell/Master Class-action petition)
25,977 (Rosemary B. Gordon)
25,979 (Donald Batiste)
25,980 (Celestine Martin)
25,984 (Ronald C. Gray)
25,986 (Gertrude Taylor)
25,997 (Deborah Martin)
25,999 (Ida Mae Jasmin)
25,655 (Chad Jones)
26,775 (Howard Ramagos)
26,785 (Pearl Armant)
26,822 (Erica Brignac)
26,828 (Ellis Hall, Sr.)
26,860 (Curtis Mosley)
26,863 (Betty Thomas)
26,864 (Wilhemina Heltz)
26,866 (Melissa Williams)
26,868 (Brenda Borne)
26,874 (Edward Banks)

FILED: Feb. 28, 2002 /s/ [Illegible]
DEPUTY CLERK OF COURT

**FINAL JUDGMENT OF JURY VERDICT**

By order of this Court, the captioned matters, which were subsumed by the Master Petition for Damages-Class Action NO. 25,975, came on for trial on all issues of liability before a twelve-member jury on October 8, 2001. All consolidated matters were tried at that time on the issue of liability only, except the matter entitled *CII Carbon L.L.C. v. Kaiser Aluminum and Chemical Corporation, et al*, bearing Docket No. 26,837, and the following matters which were tried on the issues of liability and damages:

*Axa Global Risks (U.K.), et al vs. Thomas & Betts Corp., et al*, Docket No. 26,865; and

*Kaiser Aluminum and Chemical Corporation v. Power & Control Systems, Inc., et al* Docket No. 26,821.

*Terrance Hayes et al vs. MEI Corporation, et al*, Docket No. 26,881.

In addition, the matter of *Todd Landry et al vs. Power & Control Systems, Inc., et al* Docket No. 26,542 was tried on all issues of damages and liability raised in the intervention filed on behalf of certain insurers of Kaiser Aluminum and Chemical Corporation.

Trial was held on all issues in the above captioned case by and between plaintiffs and defendants, Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., plaintiffs having settled or dismissed their claims against all other defendants originally named in these cases. Trial of these matters

concluded on November 19, 2001, when the jury rendered its verdict in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against plaintiffs assigning no fault to either Thomas & Betts Corporation or Schweitzer Engineering Laboratories, Inc., but apportioning fault to other parties appearing on the jury verdict form in accordance with Article 1812 of the Louisiana Code of Civil Procedure. Upon the reading of the jury verdict in open court and upon motion of counsel for Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., the Court adopted the jury's verdict as the judgment of the Court as follows:

**IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against all claimants, including plaintiffs, dismissing all claims against Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., however denominated, with full prejudice. Plaintiffs are hereby taxed with all costs, including expert-witness fees. The right of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. to move the court to set costs is hereby reserved.

**IT IS FURTHER ORDERED** that, in keeping with the requirements of Article 1916 of the Louisiana Code of Civil Procedure, the jury verdict apportioning fault among the various parties be, and is hereby, adopted as the judgment of the Court, to wit:

| | |
|---|---|
| Schweitzer Engineering Laboratories, Inc. | 0% |
| Thomas & Betts Corporation | 0% |
| Kaiser Aluminum & Chemical Corporation | 75% |
| Certain other defendants as set forth in the the jury verdict form | 25% |

Because the only parties adjudged at fault were dismissed before judgment was rendered, no written judgment as to damages is required or entered.

By prior Order of this Court the trial of this matter was intended to and did dispose of all remaining claims and issues in these lawsuits. Accordingly, the Court finds that there is no just reason for delay, and designates this judgment as final for purposes of Article 1915 of the Louisiana Code of Civil Procedure.

**RENDERED** in Open Court in Convent, Louisiana on the 19th day of November, 2001.

**READ AND SIGNED** in Chambers at Donaldsonville, Louisiana this 21st day of February, 2002.

/s/ [Illegible]

**HON. PEGRAM J. MIRE, JR., JUDGE**
**23rd JUDICIAL DISTRICT COURT**
**DIVISION "D"**

**TWENTY-THIRD JUDICIAL DISTRICT COURT**

**PARISH OF ST. JAMES**

**STATE OF LOUISIANA**

| | |
|---|---|
| **IN RE: GRAMERCY PLANT EXPLOSION AT KAISER** | **MASTER DOCKET NO. 25,975,** **DIVISION "D"** |
| Nov. 19, 2001 | /s/ Jan Donaldsen Dty Clerk |

JURY VERDICT FORM

1. Do you find that Schweitzer was at fault, and if so, that its fault was a legal cause of the explosion?

Yes _____
No ✓

2. Do you find that Thomas & Betts was at fault, and if so, that its fault was a legal cause of the explosion?

Yes _____
No ✓

3. Do you find that Kaiser Aluminum and Chemical Corporation was at fault, and if so, that its fault was a legal cause of the explosion?

Yes ✓
No _____

4. Do you find that Walter Hansley/Manpower was a fault, and if so, that his fault was a legal cause of the explosion?

Yes _____
No ✓

5. Do you find that Excel/Merit Electrical and Instrumentation (M.E.I.) was at fault, and if so, that its fault was a legal cause of the explosion?

Yes ✓
No _____

6. Do you find that Power and Control Systems, Inc. was at fault, and if so, that its fault was a legal cause of the explosion?

Yes ✓
No _____

7. You are now asked to allocate percentage of fault among all the parties above that you marked "yes" for, with the *total* percentage equal to 100%:

   a. Schweitzer (*only* if you answered yes to #1 above. If not, put "0"):

   0 %

   b. Thomas & Betts (*only* if you answered yes to #2 above. If not, put "0"):

   0 %

c. Kaiser Aluminum and Chemical Corporation (*only* if you answered yes to #3 above. If not, put "0"):

75 %

d. Walter Hansley/Manpower (*only* if you answered yes to #4 above. If not, put "0"):

0 %

e. Excel/Merit Electrical and Instrumentation (M.E.I.) (*only* if you answered yes to #5 above. If not, put "0"):

5 %

f. Power and Control Systems, Inc. (*only* if you answered yes to #6 above. If not, put "0"):

20 %

**Total:** 100 %

8. State the amount of damages, if any, which you would find that the plaintiffs incurred as a result of the explosion:

a. Terrance Hayes:

i. past and future physical injury suffered $ 2,700,000

ii. past and future physical pain and suffering $ 2,700,000

iii. past and future mental anguish, stress, inconvenience and loss of enjoyment of life; $ 2,700,000

| | | |
|---|---|---|
| iv. | past and future disability; | $ 4,030,000 |
| v. | past and future loss of wage and earnings capacity; | $ 770,000 |
| vi. | permanent scarring and disfigurement, and; | $ 2,700,000 |
| vii. | past and future medical expenses, including life care plan. | $ 5,400,000 |
| | Total for Hayes | $ 20,307,000 |

b. Jocelyn Pearl Hayes (daughter):

Loss of consortium, society and other impairments to the child/parent relationship $ 0

c. AXA, et al (Kaiser's Property Insurers) $ 0

d. Kaiser Aluminum and Chemical Corporation $ 0

/s/ Cindy S. Martin
**FOREPERSON**

11-19-01
**DATE**

**The Supreme Court of the State of Louisiana**

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER (LODGED AS CARL BELL, ET AL.

NO. 2006-C-1003

VS

KAISER ALUMINUM AND CHEMICAL CORPORATION

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IN RE: Kaiser Alumina & Chemical Corporation; AXA Global Risks (U.K.) etal [sic]; – Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975 and all other consolidated numbers; to the Court of Appeal, Fifth Circuit, No(s). 04-CA-1151, 04-CA-1152 THROUGH 04-CA-1191

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June 14, 2006

Denied.

CDT

PFC

BJJ

JPV

JTK

JLW

Supreme Court of Louisiana
June 14, 2006

/s/ Rai L. Daigle
Deputy Clerk of Court
For the Court

**The Supreme Court of the State of Louisiana**

IN RE GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2008-CC-0481

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IN RE: Q.B.E. International Insurance Ltd.; Swiss Reinsurance Company; Zurich Reinsurance Company; Houston Casualty Company; Munich Reinsurance Company; Qatar Insurance Company; AXA Global Risks (U.K.) et al.; Sorema Insurance Company; Winterthur International Insurance Company; Certain Underwriters at Lloyd's London; Lexington Insurance Company; Kaiser Alumina & Chemical Corporation; Hayes, Terrance; National Union Fire Insurance Company; Compagnie Transcontinentale De Reassurance; Allianz Insurance Company; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 07-C-893

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**May 2, 2008**

Denied.

JTK

CDK

BJJ

JPV

CDT

JLW

CALOGERO, C.J., would grant and assigns reasons.

Supreme Court of Louisiana
May 2, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

**The Supreme Court of the State of Louisiana**

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2008-CC-0481

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IN RE: Hayes, Terrance, Kaiser Alumina & Chemical Corporation, AXA Global Risks (U.K.) et al; – Plaintiff(s); Applying for Reconsideration of this Courts order dated May 2, 2008; Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No.07-C-893

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June 20, 2008

Reconsideration denied.

BJJ

CDK

JPV

CDT

JTK

JLW

CALOGERO, Chief Judge, would grant.

Supreme Court of Louisiana

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

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**23rd JUDICIAL DISTRICT COURT**
**FOR THE PARISH OF ST. JAMES**

**STATE OF LOUISIANA**

**MASTER DOCKET NO. 25,975** **DIVISION "D"**

**APPLIES TO: 26,542**
**26,821**
**26,865**

**IN RE: GRAMERCY PLANT EXPLOSION AT KAISER**

**FILED:** August 9, 2006 /s/ Jan Donaldsen
**DEPUTY CLERK**

**MOTION FOR DEVOLUTIVE APPEAL**

Plaintiffs, AXA Global Risks (U.K.), Allianz Insurance Company, Certain Underwriters at Lloyd's London, Compagne Transcontinentale de Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company, suing in their own names and in the names of Kaiser Aluminum and Chemical Corporation, Kaiser Alumnia Chemicals, Kaiser Jamaica, Ltd., Kaiser Bauxite Company, and Trochus Insurance Company, Ltd., through undersigned counsel,

move the court for an order of devolutive appeal from the Judgments on the jury's verdict which were signed by the trial court in the above cases on February 21, 2002.

**DIDRIKSEN LAW FIRM**

/s/ Caleb H. Didriksen

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